Petition

No. 81-876

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ST. LUKE'S FEDERATION OF NURSES AND HEALTH PROFESSIONALS,
Petitioner,

v.

PRESBYTERIAN/ST. LUKE'S MEDICAL CENTER,
Respondent.

BETH ISRAEL FEDERATION OF NURSES AND HEALTH PROFESSIONALS,
Petitioner,

v.

BETH ISRAEL HOSPITAL AND GERIATRIC CENTER,
Respondent.

ST. ANTHONY FEDERATION OF NURSES AND HEALTH PROFESSIONALS,
Petitioner,

v.

ST. ANTHONY HOSPITAL SYSTEMS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

I. Was it the intent of Congress, in passing the 1974 Health Care Amendments to the NLRA, to require the NLRB to apply a totally new standard of appropriateness in unit determinations involving health care employees?

II. Has the NLRB, as the Tenth Circuit asserts, been utilizing presumptions incorrectly in its representation proceedings?

PARTIES IN INTEREST BELOW

In each of the three cases above the National Labor Relations Board filed cross-petitions for enforcement and was a party. Presbyterian/St. Luke's Medical Center filed a Petition for Review in the Court of Appeals and is a Respondent in the instant litigation. Beth Israel Hospital and Geriatric Center filed a Petition for Review in the Court of Appeals and is a Respondent in the instant proceeding. St. Anthony Hospital Systems was a party in the proceeding before the Court of Appeals and is a Respondent in the instant cases.

St. Luke's Federation of Nurses and Health Professionals, AFT, AFL-CIO, Beth Israel's Federation of Nurses and Health Professionals, AFT, AFL-CIO, and St. Anthony Federation of Nurses and Health Professionals, AFT, AFL-CIO are joint petitioners in the instant litigation and were intervenors in the litigation below. Each is an affiliate of the Federation of Nurses and Health Professionals, a division of the American Federation of Teachers.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Lawrence A. Poltrock, Michael Radzilowsky and Gregory N. Freerksen, on behalf of the St. Luke's Federation of Nurses and Health Professionals, Beth Israel Federation of Nurses and Health Professionals, and the St. Anthony Federation of Nurses and Health Professionals, petition for a writ of certiorari to review

the judgment of the United States Court of Appeals for the Tenth Circuit in these cases. The petitioners were intervenors in each of the above litigations. The opinions all deal with the same legal issue.

OPINIONS BELOW

The opinions of the Court of Appeals (App. A, B, and C *infra*) are reported at *Presbyterian/St. Luke's Medical Center v. N.L.R.B.*, 653 F.2d 450, (10th Cir., 1981), *Beth Israel Hospital and Geriatric Center v. N.L.R.B.*, ... F.2d ....., (10th Cir., 1981), (Docket No. 801942, decided July 20, 1981); and *St. Anthony Hospital System v. N.L.R.B.*, ... F.2d ....., (Docket No. 801968, decided August 4, 1981). The opinions of the Board are unpublished and are included herein as App. D, E and F *infra*.

JURISDICTION

The Judgments of the Court of Appeals were entered on July 8, 1981, July 20, 1981, and August 4, 1981, respectively. Pursuant to extensions of time granted by Justice Byron R. White the time for filing the petition for a writ of certiorari in the *St. Luke's* case was extended to November 5, 1981, while the petitions for a writ of certiorari were extended to November 18, 1981, in both the *Beth Israel Hospital and Geriatric Center* and *St. Anthony's Hospital* cases. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set out herein as Appendix G.

STATEMENT

The Board Proceedings

Each of the three respondents operates a health care facility in Denver, Colorado. In the Fall of 1979 the Federation of Nurses and Health Professionals, an affiliate of the American Federation of Teachers, AFL-CIO launched an organizational campaign at several Denver hospitals, including the three respondents herein. The Petitions for Representation on behalf of the Registered Nurse employees at St. Luke's Hospital (a part of Presbyterian/St. Luke's Medical Center), Beth Israel Hospital and Geriatric Center and St. Anthony Hospital Systems were filed. In each case the union petitioned for a unit consisting of registered nurse employees. The employer in each case contended that Registered Nurse employees were not an appropriate unit for collective bargaining and rather that all professional employees at each facility should be included within the unit. At St. Luke's Hospital the employer also contended that the appropriate unit should consist of all three of its health care facilities in the Denver, Colorado area rather than at St. Luke's Hospital alone.

In each situation there were extensive hearings at which the union and the hospital were permitted to put on evidence in support of their position. After hearing all of the evidence presented, the Regional Director in each instance issued a written decision with his unit determination. The initial decision that was issued involved respondent Presbyterian/St. Luke's Hospital. In his decision the Regional Director applied the Board's basic position that a single facility unit was presumptively appropriate. See *Bourne, Inc.*, 217 NLRB 21. He further found that this long standing Board position was applicable to health care facilities. See *Samaritan Health Services, Inc.*, 238 NLRB 56. In reviewing the evidence presented with regard to St. Luke's Hospital he determined that the employer had failed to rebut this presumption in favor of a single facility unit. See App. D, pp. 51a-52a.

He then proceeded to deal with the question of whether the Registered Nurse unit sought by the petitioner was appropriate stating:

> "The Board has consistently held that a unit restricted to registered nurses is a presumptively appropriate one. *Mercy Hospitals of Sacramento*, 217 NLRB 765, *Allegheny General Hospital*, 239 NLRB No. 104. The Ninth Circuit Court of Appeals in *N.L.R.B. v. St. Francis Hospital of Lynwood*, 601 F.2d 404, has held that this presumption cannot be an *irrebuttable one.* The record discloses that the presumption, that registered nurses at St. Luke's constitute an appropriate unit, has *not been overcome* by the Employer's evidence." See App. D, pp. 52a-54a, for complete holding on this issue.

The Regional Director directed that an election take place in a unit of registered nurses on January 10, 1980. Presbyterian/St. Luke's Medical Center filed a timely petition for review to the National Labor Relations

Board. After reviewing the petition on January 8, 1980, the Board rejected the employers' position. The election took place as scheduled on January 10, 1980. The union won a majority of votes at the election and was certified as the bargaining agent on January 24, 1980.

A demand to bargain was made on February 12, 1980, and by letter of the same date the employer confirmed its refusal to bargain. Based on these facts a charge was filed with the National Labor Relations Board by the union. The National Labor Relations Board issued a complaint against the employer. In responding to the complaint the employer admitted the refusal to bargain but asserted it was for the purpose of litigating the validity of the Board's certification. The employer and union on March 18, 1980, entered into a Stipulation for Entry of Order and Decision by the Board. On April 14, 1981 the Board issued its decision and order directing the employer to bargain. (See App. D, pp. 31a-54a). The procedure with regard to Beth Israel was virtually identical, except that the Board supported the Regional Director's holding in light of *Newton-Wellesley Hospital*, 250 NLRB No. 86 (1981).

In the case of St. Anthony's Hospital the procedural background of the case is somewhat different. There, after the election resulted in a victory for the union, the union filed the unfair labor practice charge for refusal to bargain. The NLRB issued complaint and when the parties could not agree on language for a Stipulation for Entry of Order the employer filed its answer in the unfair labor practice case. There it raised for the first time the question of whether the 1st Amendment precluded assertion of jurisdiction by the National Labor Relations Board over the employer. The Board rejected this defense as untimely since it could and should have been

raised in the representational hearing. It issued a decision and order directing the Hospital to bargain with the Union. (See App. F, pp. 80a-81a).

The Decisions of the Court of Appeals

The Court of Appeals denied enforcement of the Board's order in each of the three cases (Appendix A, B and C *infra*). In each case the sole issue presented on appeal was whether the Board abused its discretion in certifying a unit composed only of Registered Nurses.

1. Presbyterian/St. Luke's Medical Center Opinion

In Presbyterian/St. Luke's the Court of Appeals discussed the legislative history surrounding the 1974 Amendment to the National Labor Relations Act. That Amendment extended the protection of the Act to employees of not-for-profit health care institutions. The Court correctly stated that the elimination of the exemption "reflected Congress' judgment that hospital care would be improved by extending the protection of the Act to non profit health care employees." *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 497 (1978).

The Court went on to deal with the question of whether the determination that a single facility was appropriate was within the discretion of the Board. The Board in *Memorial Medical*, 230 NLRB No. 140 (1977) had applied its general presumption in favor of single facility units to health care employers.

While not disputing the Regional Director's factual finding, the Court asserted that the Board's presumption violated the admonition against "undue proliferation" of bargaining units.

The Court did not dispute that Congress had never considered the question presented. Nor did the Court dispute that such a determination by the Board was within the language of the Act. The Court of Appeals determined that it was within its province to ascertain what Congress would have done had it considered the issue, and asserted that the Board had improperly implemented a presumption in favor of a single facility unit.

The Court went on to deal with the unit composition issue. The Court determined that the Board erred in its determination of unit composition because of the presumption utilized that a unit restricted to registered nurses could be appropriate. The Court of Appeals relied both on an assertion that this presumption impermissibly shifted the burden of challenging the appropriateness of the unit to the employer and its view that the Congressional Admonition required the Board to apply a new test i.e. "disparity of interests" in determining whether a unit consisting of less than all professional employees would be appropriate. (See App. A, p. 15a, footnote 6). The Court of Appeals remanded the case to the Board for review in light of its opinion and intervening Board determinations including *Newton-Wellesley, infra*, noting its disagreement with the Board tests enunciated in that case.

2. Beth Israel Hospital and Geriatric Center v. NLRB

The Court of Appeals reviews the procedural history set forth leading to the case coming before it. The main procedural difference between the *Beth Israel* and *St. Luke's* decisions and orders issued by the Board is the fact that the *Newton-Wellesley Hospital* decision was issued by the Board. In the *Beth Israel* decision the

Board notes that it has specifically reviewed the Regional Director's decision and record of proceeding in light of the *Newton-Wellesley* decision and reaffirms the validity of a Registered Nurse Unit. The Court of Appeals in reliance on its holding in *Presbyterian/St. Luke's* denied enforcement of the Board's order. (See App. B, p. 22a).

3. St. Anthony Hospital Systems

In *St. Anthony*, the Court of Appeals deals first with the First Amendment issue raised by the employer. The challenge is rejected on the basis that St. Anthony was not entitled to litigate the constitutional issue which could have been, but was not, raised in the prior representation proceeding. The court specifically held that "the *facts* upon which the Board determines it has jurisdiction may be challenged only upon timely exception, in the absence of which the Board's findings are not open to attack in the proceeding for enforcement." *NLRB v. Payton Fritton Stores, Inc.*, 336 F.2d 769, 770 (10th Cir. 1964).

With regard to the question of whether Registered Nurses are an appropriate unit the court determined that the Board did not go far enough in following the congressional admonition. The court asserts that "On the appropriate unit issue, the case at bar is identical in all significant respects to *Presbyterian/St. Luke's Medical Center v. NLRB*, No. 80-1426 (10th Cir. July 8, 1981), in which we held the Board's application of the rebuttable presumption both impermissibly shifts the burden of persuasion and violates Congress' directive to avoid proliferation of bargaining units in the health care industry.

REASONS FOR GRANTING THE PETITION

The decision of the Court of Appeals frustrates Congress' intent in extending the protection of the NLRA to health care employees. It reverses a longstanding policy that Registered Nurse units are appropriate for collective bargaining. It is inconsistent with the Bargaining History which has developed.[1] Given the pace and history of unionization in this field, the Court of Appeals decision will have a damaging impact on thousands of Registered Nurses.

Although we disagree with the Tenth Circuit, the most disruptive aspect of the decision is the uncertainty it brings to the collective bargaining process. Since employees have been requesting and the Board has been granting them the right to go to election involving RN only units, the law of the jungle prevails. Where the employees are willing to go out on strike or where organized labor is strong enough to force bargaining, the employees

[1] We have compiled statistics published by the Bureau of National Affairs in their White Collar Reporter publication for the period of January 1, 1976, through November 30, 1980. They are only available for that period, in monthly summaries listing the unit in which the elections were held. This compilation shows that during that period 407 Board conducted elections took place involving units of Registered Nurses. Of that number 338 elections involved Registered Nurse employees only, while the other 69 elections involved RNs and other professionals. The number of employees involved in RN only units was 41,090 while 3,353 employees were involved in the elections combining RNs and other employees. The union was certified as bargaining agent in RN units totaling 25,840 RNs.

can enjoy the fruits of their certification.[2] Where the employees trust the legal process their certification is in limbo for an extended period of time.[3] This problem will continue until the Supreme Court issues a definite ruling as to the effect of the "admonition" and whether the Board's action is within its discretion. We urge the Court to take this petition in order to end the continued disruption and uncertainty in this area. Such a resolution is desirable even if it were to uphold the position of the Tenth Circuit.

The opinions of the Court of Appeals pay lip service to recognizing the Board's discretion but in fact direct the Board to apply a standard in health care unit determinations which contradicts the basic purpose of extending jurisdiction of the Board and Act over health care facilities and is contrary to longstanding legal principles.[4] The assertion that the Federal evidentiary

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[2] The dispute over the extent of the "admonition" is creating disruption and denying the employees the fruit of certification. Contrary to the assumption embodied in the admonition, the main purpose of the 1974 Health Care Amendments was to extend the protection of the NLRA to employees of Health Care Institutions, not to avoid disruption of health care through the denial of the employees' right to organize.

[3] In a decision which they are petitioning the 10th Circuit for review, *Presbyterian/St. Luke's* has been found guilty by the Board of committing unfair labor practices by firing a union adherent, issuing reprimands to four other union adherents, and committing a list of other violations during the election campaign. *Presbyterian/St. Luke's Medical Center*, ... NLRB ..... (1981).

[4] The attorneys representing Presbyterian/St. Luke's spoke out with refreshing candor in an article in the October, 1981 issue of Modern Health Care. "Hospitals win on union bargaining units", Clifton L. Elliott and Gina Kaiser, *Modern Health Care*, Vol. 11/No. 10/October 1981, page 124. The thrust of the article is that hospitals should reorganize themselves to take advantage of the Tenth Circuit Decision and

(Footnote continued on following page)

rules are strictly applicable to review of administrative representational hearing decisions plays havoc with long-standing administrative procedures. These procedures have previously repeatedly been upheld by the courts. The Tenth Circuit's decision would require relitigation of each and every representational proceeding where an employer wished to challenge the appropriateness of the bargaining unit.

Finally, the Court's reading of the legislative history is wrong. The legislative purpose was to promote the right of employees to participate in collective bargaining if they so choose. The concern with unit proliferation was only secondary and should not be used as a weapon to defeat the rights of the employees to organize.

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[4] *continued*
frustrate unionization. They recognize that it is more difficult for unions to organize larger groups of employees with diverse interests. They openly state that the entire purpose of requesting the larger grouping is to defeat unionization. Never during legal proceeding did they put forward any reason for requesting the all professional unit for health care reasons. The stated intent of their legal position is to prevent unionization. We would hope that the Supreme Court would not be a party to such blatant abuse of the Congressional purpose in enacting the 1974 amendments.

ARGUMENT

I.

THE DETERMINATION OF "AN APPROPRIATE BARGAINING UNIT" IN A HEALTH CARE FACILITY WAS LEFT TO THE INFORMED DISCRETION OF THE BOARD BY THE 1974 AMENDMENTS.

In 1974, the National Labor Relations Act was amended to provide coverage for Health Care employers at not-for-profit hospitals. This was accomplished by deleting the phrase "or any corporation or association operating a hospital . . ." from the exclusion of covered employers. Public Law, 93-360, 93 Cong. S. 3203, 88 Stat. 395, Sec. 2(2). Thus, employees at not-for-profit hospitals came under the jurisdiction of the Board.

The Board's authority to make unit determinations is contained in Section 9(b) of the Act which states:

> "The Board shall decide in each case, whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

The Supreme Court in setting forth the parameters of the Board's role has stated:

> "We have always recognized that in making these determinations, the Board is accorded broad discretion . . . Moreover, the Board's findings of fact, if supported by substantial evidence, are conclusive . . . *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 92 S.Ct. at 393 (1971) (citations omitted)

The language of Section 9(b) was not amended with the passage of the Health Care Amendments. The committee reports accompanying passage of the amend-

ments indicate that the matter of appropriate bargaining units was of some concern to the drafters of the legislation. It is very clear that the 1974 Amendments intended to leave the Board with discretion and latitude in unit determination. Congress had before it for its consideration almost forty years of Board action and court adjudication which left bargaining unit determinations to the informed discretion of the Board. Had it been Congressional intent to restrict or vary the authority of the Board to exercise its discretion in matters of unit determination in the Health Care Industry, Congress would have statutorily expressed that intent by delineating specific units which were to be appropriate in this industry.

Such an intent was contained in S. 2292 (S. 2292, 93d Cong., 1st Sess. (1973)). That bill, introduced by Senator Robert Taft, contained specific language amending Section 9 of the Act. The bill provided that the Board could find no more than four units appropriate, i.e., professional employees; technical employees; clerical employees; and all service and maintenance employees. That bill failed to even be reported out of committee.

Instead of S. 2292 a compromise bill emerged in the form of S. 3203. (S. 3203, 93d Cong., 2d Sess. (1974)). The Senate Labor Subcommittee held lengthy hearings and debates. S. 3203, which was reported out of committee and was eventually passed by both houses of Congress and signed by the President, contained no provisions similar to those of S. 2292 limiting the number and composition of appropriate units. There was no indication from the face of the amendments that Congress intended to limit the discretion of the Board to make a determination of an appropriate unit in the health care industry.

Thus it may be said that although Congress did not have an opportunity to expressly vote on Senator Taft's approach, the failure of the bill to be reported out of committee after extended debates on the issue indicates that Senator Taft realized that his approach was not acceptable to Congress in its original form.

An issue which has received extensive consideration by the Board and Courts is the exact meaning of the committee reports and the restrictions, if any, they place on the Board in utilizing its discretion and expertise in determining hospital bargaining units.

The use of legislative history as a tool of statutory interpretations is generally useful to reviewing courts. However committee reports do not have greater weight than the plain words of a statute, particularly where the statutory language is unchanged after 35 years of interpretation and examination by the Supreme Court. In Section 9(b) of the Act, the task of determining the appropriate unit is left to the discretion of the Board. The tests to be used are to be determined by the Board. The community of interest criteria for determining the appropriate unit have been used by the Board for nearly forty years. If Congress had explicitly intended to limit or reject the standards used by the Board, it would have amended the Act. It had available the provisions of Senator Taft's original bill. However, Congress chose not to modify the language; instead, in a committee report, it cited with approval recent decisions of the Board and requested the Board continue to exercise its discretion but to take into account one additional factor, i.e., "undue proliferation of units".

A sound approach to this legislative history was enunciated by Chief Judge Fairchild of the Seventh Circuit. In his dissenting opinion in *Mary Thompson*

Hospital v. NLRB, ... F. 2d ....., 103 LRRM 2739 (1980) he states:

> "The so-called 'admonition' in the committee reports might well be given effect by a reviewing court if it aided in the interpretation of a provision of the statute, but that is not the situation presented.
>
> The 'admonition' is not part of the statute. Nor was there any change in the portion of the statute governing the Board's choice of an appropriate unit, so that the 'admonition' would be helpful in interpreting the change.
>
> Under the circumstances, the 'admonition' and the Board's response to it seem to be a matter between the Board and Congress. If the Board may be thought by members of Congress to pay insufficient heed to the 'admonition' the Board may be courting a statutory change. But it seems to me that the 'admonition' is not appropriate for application by the courts in deciding whether an order of the Board conforms to the statute or whether the Board has abused the discretion conferred on it by statute.
>
> This may be a purist approach to the source of statutory law, but so be it."

Where the language of a statute is ambiguous the committee reports should guide the courts. However neither the committee reports nor the Congressional Record are passed by Congress or signed by the President. They are not the law. Presumptively Congress would have modified Section 9 if it chose to strip the Board of its discretion or was dissatisfied with its performance. In fact it did make several statutory modifications in the NLRA applicable to health care facilities i.e., the ten-day notice provision which was enacted for economic strikes in the health care industry. Congress explicitly recognized the need to avoid the disruption of patient care due to strikes and specifically wrote in standards not applicable to any other industry.

Concerning appropriate units, it admonished the Board but did not amend Sec. 9(b). The fact that the issue was specifically raised in the Taft bill, which never made it out of committee, gives a strong indication that a more flexible approach was preferred by Congress. The Court's decision gives the admonition more importance than it deserves. In this case the admonition is being used to frustrate the will of the employees as expressed in a secret ballot election. (See footnote 4, *supra*).

II.

THE REMARKS OF SENATORS TAFT AND WILLIAMS CLEARLY INDICATE THAT CONGRESS INTENDED TO LEAVE THE BOARD DISCRETION IN THE AREA OF APPROPRIATE UNIT DETERMINATION IN HEALTH CARE INSTITUTIONS.

On May 2, 1974 Senator Taft clarified his personal position with regard to the Amendments which were ultimately passed by stating:

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 NLRB No. 170, 83 LRRM 1242 (1973).[5]
>
> *I believe this is a sound approach and a constructive compromise, as the Board should be permitted some*

[5] The Board's decisions in each of these three cases used the same "community of interest" analysis as utilized in the instant cases.

> *flexibility in unit determination cases.* I cannot stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to jurisdiction disputes and work stoppages must be prevented. (emphasis added) 120 Cong. Rec. 12944-45 (1974)

Senator Williams, the Chairman of the Committee which drafted the compromise legislation stated:

> "While the committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health care industry, it did not within this framework intend to preclude the Board from acting in the public interest by exercising its specialized experience and expert knowledge in determining appropriate bargaining units. *N.L.R.B. v. Delaware-New Jersey Ferry Co.*, 128 F. 130 (3d Cir. 1942), 120 Congressional Record 22949 (1974).

From a reading of these remarks it is clear that Congress did not intend to foreclose the Board from finding appropriate bargaining units other than those four classifications listed in Senator Taft's original bill.

In *Vicksburg Hospital v. NLRB*, ... F.2d ....., 108 LRRM 2074 (5th Cir. 1981) the Court upheld the Board's unit determination that a unit could consist of service, maintenance and technical employees. While conceding that a separate unit for technical employees might also be appropriate, the Court held that the employer had not met the burden of showing that the Board's unit was inappropriate. Thus the Court properly found that the burden in challenging the Board's unit determinations lies with the employer.

In *NLRB v. Sweetwater Hospital Assn.*, 604 F.2d 454, 102 LRRM 2247 (1979), the Sixth Circuit held that a unit consisting of LPN's and technical employees is

appropriate. The Court was presented with a situation in which the employees requested a unit consisting solely of LPN's. The employer requested a unit of all non-professional non-administrative employees. The Board found that a unit of all technical employees was an appropriate unit. The employer refused to bargain and the Sixth Circuit was called upon to determine whether the NLRB properly weighed the Congressional admonition in finding the unit appropriate. The Court held that the congressional concern about undue proliferation did not remove all NLRB discretion in certifying bargaining units and it did not mean that all non-professional hospital employees must be covered by a single unit. *NLRB v. Sweetwater, supra* at 2248.

As pointed out by the Court of Appeals in *Bay Medical Center, Inc. v. NLRB*, 558 F.2d 1174 (6th Cir. 1978) each unit determination involves specific consideration of individual factors. That determination has traditionally been left to the Board's expertise. The Court stated:

> "The Medical Center argues, however, that the Board's reluctance to interfere with an existing bargaining relationship is not reason enough to justify deviation from its established policy. We do not accept this position. It would, in effect, establish a general rule that LPN's must be included in technical unit. *We refuse to deprive the Board of the flexibility it needs to fashion bargaining units to fit peculiar fact situations.*
>
> Courts have long recognized that the Board may take bargaining history into account when determining whether a proposed bargaining unit is appropriate. *Congress also recognized that bargaining history should continue to be a relevant concern in the health care field.* (emphasis added)

Even in *NLRB v. St. Francis of Lynwood*, 604 F.2d 404 (1979), where the Board's bargaining order for RN Units was not enforced, the court recognized that bargaining determinations were entrusted to the Board. The Court stated:

> ". . . 'due consideration' demands individual examination by the Board, or its delegate, of the circumstances of each particular case in order to determine the propriety of the proposed unit in light of the congressional directive and the public interest. It is in that manner that the Board exercises 'its specialized experience and expert knowledge'".

The Board should not be restrained from utilizing its' discretion. It is our basic contention that with regard to Registered Nurse units in general and in these cases in particular the Board has properly fulfilled its role and should be upheld. *Newton-Wellesley, supra.*

III.

THE "SINGULARITY OF INTEREST" STANDARD APPLIED IN THESE CASES MEETS THE BOARD'S OBLIGATION IN DETERMINING APPROPRIATE UNITS.

The "singularity of interest" test utilized in these cases not only takes into account the facts included under traditional community of interest tests but also includes additional considerations springing from the Congressional admonition against undue proliferation of bargaining units. This test is consistent with the position of Board Member Penello articulated in his dissenting opinion in *Allegheny General Hospital*, 239 N.L.R.B. No. 104, 100 L.R.R.M. 1030 (1978) enf. denied 608 F.2d 965, 102 L.R.R.M. 2784 (3rd Cir. 1979); and *St. Vincent's Hospital*, 223 NLRB 638 (1976).

Penello's test for unit appropriateness requires a showing that employees enjoy an "exceptionally strong community of interest among themselves—significantly greater than that which would normally justify separate representation in other industries." *Allegheny General Hospital, supra.*

Penello then discussed the Board's opinion in *Mercy Hospital of Sacramento*, 217 NLRB 765 (1975). Penello found that Registered Nurses in that case possessed an exceptionally high degree of community of interests among themselves, distinct and apart from other professionals; this has been characterized as a "singularity of interests." Thus, Penello believed that an RN unit could be appropriate. Penello's basic approach adopted by the Third Circuit has been followed by other Courts of Appeals which have dealt with Service/Maintenance Units. See *Mary Thompson Hospital, Inc. v. N.L.R.B.*, ... F.2d ....., 103 LRRM 2730 (7th Cir. 1980); *N.L.R.B. v. Mercy Hospital Association*, 606 F.2d 22 (2d Cir. 1979), *cert. denied*, 48 U.S.L.W. 3662 (U.S. April 14, 1980); *N.L.R.B. v. West Suburban Hospital*, 570 F.2d 213 (7th Cir. 1978); *St. Vincent's Hospital v. N.L.R.B.*, 567 F.2d 588 (3d Cir. 1977). It was inappropriate for the Tenth Circuit to blindly rely on the holdings of the maintenance unit cases. Penello, using the same reasoning which underscored the maintenance unit cases, has repeatedly found RN-only units to be appropriate.

In *Newton-Wellesley Hospital*, 240 N.L.R.B. No. 86, 104 LRRM 1384 (1980), Penello reaffirmed his belief that the RN unit discussed in that case was appropriate. A review of the facts of *Newton-Wellesley* shows that the reasoning utilized in that case is directly applicable to the instant cases as the relevant facts are almost identical.

IV.

THE BOARD'S PRESUMPTION IN FAVOR OF A SINGLE FACILITY WAS NOT MODIFIED BY THE 1974 HEALTH CARE AMENDMENTS.

It is clear from Section 9(b) of the Act and myriad Board decisions that a unit of employees at a single location in multilocation enterprises is presumptively an appropriate unit for bargaining. See *Swift & Company*, 129 NLRB 1391; *United States Steel Corporation*, 192 NLRB 58.

As the Board explained in the context of retail stores:

> employees in a single retail outlet form a homogeneous, identifiable, and distinct group physically separated from employees in other outlets of the chain; they generally perform related functions under immediate supervision apart from employees at other locations; and their work functions, though parallel to, are nonetheless separate from the functions of employees in other outlets, and thus their problems and grievances are peculiarly their own and not necessarily shared with employees in other outlets. *Saxon Drugs, Inc.*, 138 NLRB 1032, 1033 (1962)

This presumption, of course, is not conclusive. It may be rebutted by a showing of circumstances that militate against the appropriateness of a single facility unit. Factors that may combine to overcome the presumption include a lack of substantial autonomy in the local facility manager or administrator to handle operations and supervise day-to-day work of the employees; substantial employee interchange among the facilities; a bargaining history in a different unit; geographic proximity of the facilities; and the presence of a union seeking to represent the employees in a larger unit. *Walgreen Co. v. NLRB*, 564 F.2d 751, 754 (7th Cir. 1977); *NLRB v. Lerner Stores Corp.*, 506 F.2d 706, 708 (9th Cir. 1974).

This policy has repeatedly been applied to health care facilities. See *Memorial Medical*, 230 NLRB No. 140 N.S. (1977), *Samaritan Health Services, Inc.*, 238 NLRB No. 56 (1978). As noted above this policy was never discussed during the congressional debate. We find no basis for asserting that this was merely an oversight since most other concerns were discussed at length and either written into the legislation or mentioned in the Congressional Committee reports. The Tenth Circuit in accepting the arguments of the Employer that the admonition was applicable with regard to multi-facility units, went beyond its bounds into speculation as to what Congress would do if faced with the issue. This is clearly not the province of the court. None of the court cases cited by it support the proposition that the courts should step in and determine that an interpretation of the "admonition" which flies in the face of long-standing Board policy, the plain meaning words of the Act, and the remedial purpose, was the intent of Congress. In reaching this result the court ignores the basic purposes of the 1974 Amendments.

The Court does not explain in what way its holding would lessen disruption in health-care facilities. If an employer is organized on a multi-facility basis the possibility that several health care facilities will be on strike at the same time is increased. It is illogical to assert that the public would be better served if the disruption to health care would affect several facilities at the same time.

The only justification offered for a larger unit is that offered by the attorneys for Presbyterian/St. Luke's in the October, 1981, issue of Modern Health Care. There they assert that requiring broader units will make organizing health care employees more difficult. This

frustrates the essential purpose behind the 1974 amendments to the Act: to extend the coverage of the Act to health care employees.

V.

THE TENTH CIRCUIT'S HOLDING THAT THE FEDERAL RULES OF EVIDENCE ARE APPLICABLE TO BARGAINING UNIT DETERMINATIONS IS ERRONEOUS.

Prominent in the Tenth Circuit opinion in each of the three cases was the determination that the presumption utilized violated Rule 301 of the Federal Rules of Evidence. This holding is erroneous and could potentially disrupt the settled procedure and precedent with regard to bargaining unit cases.[6] The Tenth Circuit overlooks the fact that the only hearing conducted in bargaining unit determinations is an investigatory hearing of the sort provided for by Section 9(c)(1) of the Act. It is only with respect to hearings adjudicating unfair labor practice charges, pursuant to Section 10 of the Act, that the statute provides that the proceeding shall, to the extent practicable, be conducted in accordance with the rules of evidence governing proceedings in the district courts of the United States. *Catholic Med. Ctr. of Brooklyn & Queens v NLRB*, 589 F.2d 1116 (2d Cir. 1978) There is no comparable requirement for Section 9(b) investigative hearings, and accordingly the Board's Rules and Regulations, Series 8, as amended (29 C.F.R.), Sec. 102.66(a), provide that

[6] The Board has petitioned for rehearing on this basis in the Tenth Circuit. If their position prevails we will advise this court and drop this challenge to the Tenth Circuit's decision. Unless presented in this petition our right to challenge this portion of the Court of Appeal's decision would have been waived.

"[t]he rules of evidence prevailing in courts of law or equity shall not be controlling" in Section 9(c) hearings. See *Riverside Press, Inc. v. NLRB*, 415 F.2d 281, 283 (5th Cir. 1969), *cert. denied*, 397 U.S. 912. This is only one of the important differences between representation proceedings and unfair labor practice proceedings: for example, unlike unfair labor practice cases, representation proceedings are nonadversary,[7] normally immune from direct judicial review, *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-482 (1964); *AFL v. NLRB*, 308 U.S. 401, 405-412 (1940); *Furr's Inc. v. NLRB*, 350 F.2d 84, 86 (10th Cir. 1965) and, because exempted by Section 5(a)(3)(6) of the Administrative Procedure Act (5 U.S.C. Sec. 554(a)(3)(6)), presided over by hearing officers employed by the Board's regional offices rather than by administrative law judges. *NLRB v. Union Brothers*, 403 F.2d 883, 888 (4th Cir. 1968); *NLRB v. Ideal Laundry and Dry Cleaning Co.*, 330 F.2d 712, 715 (10th Cir. 1964).

A similar misapprehension of well-settled Board procedure underlies the Court's holding that the Board's use of a rebuttable presumption that a particular unit is an appropriate one impermissibly alters the General

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[7] See the Board's Statements of Procedure, 29 C.F.R. Sec. 101.20(c) (emphasis supplied):

> The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions.

Counsel's burden to establish by a preponderance of evidence that an unfair labor practice has occurred under Section 8(a)(5) of the Act.

In unfair labor practice cases arising out of an employer's refusal to bargain as a means of obtaining judicial review of a certification, the Section 8(a)(5) unfair labor practice proceeding is merely "the vehicle for testing the validity of an RC Representation Proceeding." *NLRB v. Douglas County Electric Membership Corp.*, 358 F.2d 125, 127 (5th Cir. 1966). The Board's use of rebuttable presumptions of bargaining unit appropriateness in its representation cases has absolutely no effect on the General Counsel's burden in such unfair labor practice cases. The General Counsel is not a party in the nonadversary investigative representation proceedings in the underlying representation case. Rather, in such circumstances, the unfair labor practice proceeding adds the element of the employer's refusal to bargain with the certified union and "[n]othing more appearing, a single trial of the [representation] issue [is] enough." *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).[8]

Accordingly, whether or not the Board in the underlying representation proceeding utilized a rebuttable presumption of unit appropriateness, the General

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[8] Accord: *NLRB v. Gold Spot Dairy*, 432 F.2d 125, 129 (10th Cir. 1970); *NLRB v. WEK Drilling Co.*, 438 F.2d 267, 269-270 (10th Cir. 1971). *State Farm Mutual Automobile Ins. Co. v. NLRB*, 411 F.2d 356, 361 (7th Cir. 1969), cert. denied, 396 U.S. 832. This principle applies not only when the Board has made the decision in the representation proceeding, but also when the Regional Director, as the Board's agent pursuant to a delegation of authority permitted by Section 3(b) of the Act, has made the decision. *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141-143 (1971); *NLRB v. Gold Spot Dairy*, 432 F.2d at 127.

Counsel's position in the related Section 8(a)(5) proceeding challenging that unit determination is the same: the bargaining unit issue was litigated and determined by the Board in the underlying representation proceeding, and in the absence of newly discovered or previously unavailable evidence or some other special circumstance, the issue is not subject to relitigation in the unfair labor practice proceeding.[9] The Board, of course, retains the discretion to reconsider issues that were previously decided in the representation proceeding, See *NLRB v. Children's Baptist Home of Southern California*, 576 F.2d 256, 261-262 (9th Cir. 1978), but assuming the Board adheres to the prior certification decision, as is the usual case, proof that the employer has refused to bargain with the certified representative of its employees is sufficient to make out a violation of Section 8(a)(5). It is at this point—"where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed"—that judicial review of the representation proceeding first becomes available under Section 10(e) and (f) of the Act. *Boire v. Greyhound Corp.*, 376 U.S. at 477. And in such cases, Section 9(d) of the Act provides that the certification and the record of the representation case investigation upon which the Board's unit determination was based, will be included in the transcript of the entire record

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[9] Compare *Magic Pan, Inc. v. NLRB*, 627 F.2d 105, 107 (7th Cir. 1980), enforcing 244 NLRB 630, 631 (1979) and *Prudential Ins. Co. of America v. NLRB*, 529 F.2d 66, 67, 68 (6th Cir. 1976) enforcing 215 NLRB 66 (1974) (where the Board's unit determination decision relied on the presumptive appropriateness of the unit found) with *Pan American Petroleum Corp.*, 179 NLRB 180, 181 (1969), enf'd 444 F.2d 328 (10th Cir. 1971), cert. denied, 404 U.S. 941 (where no presumption was utilized).

filed with the court of appeals. *Furr's Inc. v. NLRB*, 350 F.2d at 86. Thus it was the representation case record—a record made not by the General Counsel but by the employer, the union, and the Board agent conducting the investigative hearing—that the Court reviewed in this case in deciding whether the Board acted within its broad discretion in making its unit determination. In such cases, the burden is on the employer to demonstrate that the Board abused its discretion in determining the appropriateness of the bargaining unit. *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1037-1038 (9th Cir. 1978); *NLRB v. New Enterprise Stone & Lime Co.*, 413 F.2d 117, 118 (3rd Cir. 1969); *NLRB v. Schill Steel Products, Inc.*, 340 F.2d 568, 574 (5th Cir. 1965).

The Board's use of rebuttable presumptions of bargaining unit appropriateness is an established part of its administration of the thousands of representation cases that it must process each year.[10] In cases arising outside of the health care industry the Board's use of such presumptions has consistently been approved by the courts.[11] Such presumptions provide useful guidance to employers and unions, since by defining the standard that the Board will apply in resolving bargaining unit

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[10] In fiscal year 1979, the Board received more than 11,000 representation petitions for secret ballot elections in initial union organizing campaigns, and conducted over 7,000 elections in such cases. *Forty-Fourth Annual Report of the National Labor Relations Board*, 15, 17 (GPO 1980). Over 2,000 of these elections were directed by the Board or one of its regional directors (*id.* at 289), and thus, as in the present case, required a pre-election hearing.

[11] See, for example, *Big Y Foods Inc. v. NLRB*, ... F.2d ....., 107 LRRM 2971, 2974-2975 (1st Cir. No. 80-1578, 1981) (finding Federal Rule of Evidence 301 inapplicable to the presumption); *Magic Pan, Inc. v. NLRB*, 627 F.2d at 107; *Prudential Ins. Co. of America v. NLRB*, 529 F.2d at 67-68.

disputes, they both aid the parties in determining whether to litigate unit issues and expedite such litigation should it occur. By erroneously holding that Rule 301 of the Federal Rules of Evidence is applicable to the Board's use of rebuttable presumptions of unit appropriateness and that such presumptions impermissibly relieve the General Counsel of his burden to establish by a preponderance of the evidence that an unfair labor practice has occurred, the Court has raised doubts in an area where the law, deservedly, has heretofore been well settled. The result can only be to invite unnecessary litigation and thereby to encourage, contrary to sound policy, "dilatory tactics by employers or unions disappointed in the election returns" (*NLRB v. Joclin Mfg. Co.*, 314 F.2d 627, 632 (2d Cir. 1963); see also 93 Cong. Rec. 6444(2) (1947) (Sen. Taft)).

If allowed to stand this decision could totally disrupt the operation of the Board's machinery. In delaying the resolution of a bargaining unit challenge by eighteen to 24 months, countless cases will be added to the workload of the Board, and ultimately to the courts. For that reason alone, this Court would be justified in reversing the decision of the Tenth Circuit.

CONCLUSION

For the reasons set forth above we would ask this Court to grant our petition for certiorari. The purpose for passage of the Health Care Amendments was to extend the protections of the Act to employees at not-for-profit health care facilities. The admonition against undue proliferation contained in the committee reports is being used in a way that defeats the basic purpose of the legislation. The only way that the dispute concerning the application of this admonition can authoritatively be resolved is for this Court to issue a definitive opinion.

We urge the Court to take this case and affirm the rights of the Registered Nurse employees to form bargaining units which recognize their unique role in the operation of health care institutions.

Respectfully submitted,

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Appendix

No. 81-876

Office Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ST. LUKE'S FEDERATION OF NURSES AND HEALTH PROFESSIONALS,
Petitioner,

v.

PRESBYTERIAN/ST. LUKE'S MEDICAL CENTER,
Respondent.

BETH ISRAEL FEDERATION OF NURSES AND HEALTH PROFESSIONALS,
Petitioner,

v.

BETH ISRAEL HOSPITAL AND GERIATRIC CENTER,
Respondent.

ST. ANTHONY FEDERATION OF NURSES AND HEALTH PROFESSIONALS,
Petitioner,

v.

ST. ANTHONY HOSPITAL SYSTEMS,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1981

ST. LUKE'S FEDERATION OF NURSES AND HEALTH PROFESSIONALS,

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BETH ISRAEL FEDERATION OF NURSES AND HEALTH PROFESSIONALS,

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Respondent.

ST. ANTHONY FEDERATION OF NURSES AND HEALTH PROFESSIONALS,

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v.

ST. ANTHONY HOSPITAL SYSTEMS,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
No. 80-1426—Filed July 8, 1981

PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER,
Petitioner-Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Appellee.

and

ST. LUKE'S FEDERATION OF NURSES AND HEALTH PROFESSIONALS,
Intervenor.

On Petition for Review and Cross-Application
For Enforcement of an Order of The
National Labor Relations Board
(Case No. 27-CA-6574-2)

Clifton L. Elliott and Gina Kaiser of Roan & Grossman, Kansas City, Missouri, for Petitioner-Appellant.

Linda Dreeben, Attorney (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, and John H. Ferguson, Attorney, with her on the brief), National Labor Relations Board, Washington, D.C., for Respondent-Appellee.

Michael Radzilowsky (Lawrence A. Poltrock and Stephen G. Daday with him on the brief), of DeJong, Poltrock & Giampietro, Chicago, Illinois, for Intervenor.

K. Bruce Stickler and Arthur E. Back of Wood, Lucksinger & Epstein, Chicago, Illinois, filed an amicus curiae brief for American Hospital Association.

Before BARRETT and LOGAN, *Circuit Judges*, and O'CONNOR, *District Judge.**

BARRETT, *Circuit Judge.*

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*Of the United States District Court for the District of Kansas, sitting by designation.

Presbyterian/St. Luke's Medical Center seeks review of an unreported order of the National Labor Relations Board requiring it to bargain with the St. Luke's Federation of Nurses and Health Professionals AFT, CFT, AFL-CIO. The Board cross-petitions for enforcement of the order.

Presbyterian/St. Luke's Medical Center is a three hospital system located in Denver, Colorado. The Center grew out of a July, 1979, merger between St. Luke's Hospital Association and the Presbyterian Medical Center. Prior to the merger, St. Luke's Hospital Association operated a single facility—St. Luke's hospital. The Presbyterian Medical Center operated two institutions—one hospital located ten blocks from the St. Luke's facility, and a second acute-care institution twelve miles away in Aurora, Colorado. *See The Presbyterian Medical Center*, 218 N.L.R.B. No. 192 (1975).

In October, 1979, the Union filed with the Board a petition for certification as the bargaining representative of the registered nurses employed at the St. Luke's facility of the Medical Center. The Medical Center contested the petition challenging the appropriateness of the bargaining unit. The unit is limited to registered nurses at the St. Luke facility only, rather than all professionals, other than physicians, at all three hospitals. The Medical Center's position was tied to Congress' directive that the Board avoid unnecessary proliferation of bargaining units in non-profit health care facilities.

Following five days of hearings, the Board's regional director found that a separate unit of registered nurses at the St. Luke's facility was appropriate for collective bargaining purposes. The Medical Center's request for Board review was denied in January, 1980. Thereafter, a majority of the employees in the unit selected the Union as their representative. On January 24, 1980, the Board certified the Union as the exclusive collective bargaining representative for all registered nurses at St. Luke's Hospital.[1]

---

[1] The bargaining unit certified consists of:

INCLUDED: All full-time and regular part-time registered nurses, including in-service education nurses, cardiovascular specialists, diabetic stroke technicians, hyperelementation nurse clinician, float pool nurses, certified anesthetists, and all other registered nursing employees at the St. Luke's facility of the employer located at 601 E. 19th Avenue in Denver, Colorado.

EXCLUDED: Unit supervisors, assistant unit supervisors, department directors, assistant department directors, patient representatives and other supervisory and managerial employees, and guards as defined in the Act and all other employees of the above facility.

When the Medical Center subsequently refused to bargain with the Union, unfair labor practice charges were filed. Violations of § 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C.A. § 158(a)(1), (5), were alleged. In answer to the charges, the Medical Center admitted the refusal to bargain, defending instead on the inappropriateness of the unit. The Board overruled the Medical Center objections and ordered the Medical Center to bargain with the Union on request, as well as to post notices to that effect.

The sole issue on appeal is whether the Board erred in holding that the Medical Center committed an unfair labor practice by refusing to bargain with the St. Luke's Federation of Nurses and Health Professionals AFT, CFT, AFL-CIO.[2]

The Appropriateness of the Bargaining Unit

For nearly thirty years, non-profit health care institutions were excluded from the operation of the National Labor Relations Act, *supra*. In 1974, Congress amended the Act extending coverage to large numbers of employees in the industry. *See generally*, Vernon, *Labor Relations in the Health Care Field under the 1974 Amendments to the National Labor Relations Act*, 70 NW. U. L. Rev. 202 (1975). The elimination of this exemption "reflected Congress' judgment that hospital care would be improved by extending the protection of the Act to nonprofit health care employees." *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 497 (1978).

One area of concern encompassed by the legislation dealt with disputes over bargaining units. Unable to

[2] It is settled that "an employer may secure judicial review of a unit determination by simply refusing to bargain with a union after its certification." *Osteopathic Hospital Founders Asso. v. NLRB*, 618 F.2d 633, 640 (10th Cir. 1980).

agree on specific legislation, the House and Senate committees considering the amendment chose to address the problem in their respective reports. Each committee wrote:

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]
>
> [1] By our reference to *Extendicare*, we do not necessarily approve of all of the holdings of that decision.
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> S.Conf. Rep. No. 988, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News pp. 3946, 3950; S.Rept. No. 766, 93d Cong., 2d Sess. 5 (1974); H.Rept. No. 1051, 93d Cong., 2d Sess. 7 (1974).

Much has been written concerning the committees' statements in this area. *Mary Thompson Hospital, Inc. v. N.L.R.B.*, 621 F.2d 858 (7th Cir. 1980); *Allegheny General Hospital v. N.L.R.B.*, 608 F.2d 965 (3d Cir. 1979); *N.L.R.B. v. Mercy Hospital Ass'n.*, 606 F.2d 22 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (1980); *N.L.R.B. v. St. Francis Hospital of Lynwood.*, 601 F.2d 404 (9th Cir. 1979), *N.L.R.B. v. West Suburban Hospital*, 570 F.2d 213 (7th Cir. 1978); *St. Vincent's Hospital v. N.L.R.B.*, 567 F.2d 588 (3d Cir. 1977); *Long Island College Hospital v. N.L.R.B.*, 566 F.2d 833 (2d Cir. 1977), *cert. denied*, 435 U.S. 996 (1978); *Memorial Hospital of Roxborough v. N.L.R.B.*, 545 F.2d 351 (3d Cir. 1976). With most of it we agree. In one statement, we heartily concur:

> Congress directed the Board to apply a standard in this field that was not traditional. Proliferation of units in industrial settings has not been the subject of congressional attention but fragmentation in the health care field has aroused legislative apprehension.

St. Vincent's Hospital v. N.L.R.B., supra, at p. 592.

A.

Unit Scope

The appropriateness of a bargaining unit depends on both its scope and composition. We here deal with the first consideration—whether the bargaining unit should comprise employees solely at St. Luke's Hospital or at all employer facilities.

The Board has declined to accede to Congress' directive in determining issue of unit scope. In *Memorial Medical,* 230 N.L.R.B. No. 140 n. 5 (1977), the Board held that the legislative history of the 1974 amendments demonstrates that concern with bargaining unit proliferation was solely with the composition of units within particular facilities, not with the question of whether the unit's scope should include one facility or several facilities.

Rather than apply Congress' directive, the Board has presumed single facility units appropriate "where there is no bargaining history in a more comprehensive unit and the degree of functional integration with other facilities is insufficient to negate the separate identity of the facility in which a union seeks representative status." *Samaritan Health Services, Inc.,* 238 N.L.R.B. No. 56 (1978). The presumption is, of course, rebuttable. *Id.* Among the factors considered are the geographic proximity of the facilities, history of collective bargain-

ing unionization, extent of employee interchange, functional integration of operations, and centralization of management, particularly in regard to control of personnel and labor relations. *See e.g., N.L.R.B. v. Groendyke Transport, Inc.*, 417 F.2d 33 (10th Cir. 1969), *cert. denied*, 397 U.S. 935 (1970); *Magic Pan, Inc. v. N.L.R.B.*, 627 F.2d 105 (7th Cir. 1980); *N.L.R.B. v. Chicago Health and Tennis Clubs, Inc.*, 567 F.2d 331 (7th Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

Consistent with the Board's views, the regional director applied the presumption here holding that "while a systemwide unit may be appropriate, the evidence does not rebut the presumption." R., Vol. I, p. 4. The Medical Center argues that the application of this presumption is inconsistent with the congressional admonition against undue proliferation of bargaining units in the health care field.

The issue as to what unit is appropriate for bargaining rests in the sound discretion of the Board. *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485 (1947); *Newspaper Printing Corp. v. N.L.R.B.*, 625 F.2d 965 (10th Cir. 1980). Nevertheless, we must insure that the Board's exercise of discretion is not unreasonable, arbitrary, unsupported by the evidence, or in conflict with congressional intent. *S.E.C. v. Sloan*, 436 U.S. 103 (1978); *N.L.R.B. v. Brown*, 380 U.S. 278 (1965).

Our reading of the legislative history underlying the 1974 amendments confirms the Board's views that the references "cautioning against undue proliferation in the health care field refer to matters involving unit composition, that is, the types of employees to be represented in a bargaining unit . . . with which any single institution must collectively bargain." *Memorial Medical, supra*, at n. 5. We do not agree, however, that this concern

necessarily demonstrates congressional insensitivity to proliferation problems caused by mechanical application of the presumption to issues of unit scope. Nor do we believe Congress' silence in this area blindly constituted ratification of the single facility presumption in health care facilities. In our view, it appears more likely that Congress did not anticipate the issue.

The Board is given broad authority to determine the unit appropriate for collective bargaining under section 9(b) of the Act, 29 U.S.C.A. § 159(b). Neither the Act nor the legislative history offer conclusive answers to the issue at bar. "But the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in light of the evident legislative purpose in enacting the law in question." *United States v. Bornstein*, 423 U.S. 303, 310 (1976).

It has long been a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Steelworkers v. Weber*, 443 U.S. 193, 201 (1979), *quoting Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). In the construction of labor legislation the principle has "particular application." *Woodword Manufacturers v. N.L.R.B.*, 386 U.S. 612, 619 (1967). This is so because legislation such as that involved here is "to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor". *Local 1976, United Brotherhood of Carpenters v. N.L.R.B.*, 357 U.S. 93, 99-100 (1958); *Woodwork Manufacturers v. N.L.R.B., supra.*

The legislative history here reveals a strong current of congressional concern for the problems engendered by

unwarranted unit fragmentation whether it be in composition or scope. As we view it, the Board's refusal to consider Congress' directive with regard to scope issues has subjected the health care industry to the very dangers Congress sought to prevent.

We hold that the traditional factors used in scope determinations "must be put in balance against the public interest in preventing fragmentation in the health care field." *St. Vincent's Hospital v. N.L.R.B., supra,* at p. 592. Moreover, the Board must specify "the manner in which its unit determination[s] . . . implement[] or reflect[] that admonition." *N.L.R.B. v. West Suburban Hospital, supra,* at p. 216.

We recognize that labor legislation should normally be construed in a liberal manner to effectuate its remedial purposes. However, in our anxiety to aid the congressional purpose of promoting industrial stabilization through collective bargaining, we must guard against extending the scope of the statute beyond Congress' intent. *62 Cases of Jam v. United States,* 340 U.S. 593, 600 (1951). The Board has failed to recognize Congress' directive in unit scope determinations.

Unit Composition

We now turn to the question of whether the Board erred in its determination of the unit's composition.

In the representation proceeding, the regional director ruled that (a) a unit restricted to registered nurses is presumptively appropriate, and (b) based on the Board's singularity of interests analysis, the presumption in favor of the registered nurses unit was not *overcome* by the Medical Center. Inasmuch as the Board erred in accepting the presumption of appropriateness, we must deny enforcement of its order.

(a)

The use of rebuttable presumptions is tied to various rationale—judicial economy, regularity and fairness; probability, and public policy. Louisell and Mueller, *Federal Evidence* § 68, pp. 541-542. Yet, the procedural effects may differ. Most affect only the burden of producing evidence. *See e.g.*, Fed. Rules Evid. rule 301, 28 U.S.C.A. Others affect both the burdens of producing evidence *and* of persuasion. *See e.g. Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973). In those presumptions falling within the first category, "the presumption *disappears* upon introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact. [Emphasis supplied]." Louisell and Mueller, *supra* at § 69, pp. 554-555. *See* Fed. Rules Evid. rule 301, 28 U.S.C.A.; Comm. of Conf. Rep. No. 93-1597, 93d Cong., 2d Sess., *reprinted* [1974] U.S. Code Cong. & Admin. News pp. 7098, 7099. Rebuttable presumptions falling within the second category "retain their vitality until the trier of fact is persuaded as to the nonexistence of the presumed fact." Louisell and Mueller, *supra* at § 69, p. 555.

Our review of the record convinces us that the rebuttable presumption applied in this case shifted *both* the burdens of producing evidence *and* persuasion. The regional director specifically held that the presumption was not overcome by the Medical Center's evidence.

In our view, there was sufficient evidence adduced to sustain the appropriateness of an all professional unit, excluding physicians. We, of course, focus on the "disparity of interests between employee groups which would prohibit or impede fair representation of employee interests." *N.L.R.B. v. St. Francis Hospital of Lynwood, supra*, at p. 419. A multi-disciplinary team ap-

proach to patient care is employed by the Hospital. Interaction between registered nurses and other professionals is encouraged. Decentralization of the pharmacy has occurred with the physical relocation of individual pharmacists to nursing stations at patient care units. Social workers at the facility spend one-half their time in the patient care units. This, of course, results in substantial interaction between these professionals and the staff nurses.

Several nurses at the facility observed that they have little contact with nurses from units other than their own. One post-operative nurse observed that she had more contact with physical therapists than nurses outside her specialty. Other specialty nurses supported this view. Christin Tanner, a noted nurse educator, testified that nurses who specialize often have more in common with persons in disciplines related to the specialties than other registered nurses practicing in other specialty areas.

Certain of the registered nurses work 3:00 p.m.-11:30 p.m. or 11:00 p.m.-7:30 a.m. This factor alone, however, is not dispositive. *Id.* at p. 419. Similarly, the licensing-education requirements, and departmental segregation are not wholly controlling. *Id.* at p. 419. "The fact that a state may choose to regulate a particular occupation should not be controlling in the determination of an appropriate bargaining unit." *Id.* at p. 420.

In sum, the evidence presented was sufficient to sustain a finding of the inappropriateness of the proposed unit had it been accepted. If the presumption had simply shifted the burden of producing evidence to the employer, the offer of this contradictory evidence would have neutralized the presumption.

In unfair labor practice hearings, such as that presented here, the Board, to the extent practicable, must apply the rules of evidence governing proceedings in the district courts of the United States. N.L.R.A. § 10(b); 29 U.S.C.A. § 160(b); *N.L.R.B. v. Process & Pollution Control Co.*, 588 F.2d 786 (10th Cir. 1978). When the Federal Rules of Evidence were adopted, Congress provided that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party against whom it was originally cast." Fed. Rules Evid. rule 301, 28 U.S.C.A.

Application of the presumption employed here violated the mandate of Federal Rule of Evidence 301.[3] Such a presumption cannot be used to alter General Counsel's burden to establish by a preponderance of evidence that an unfair labor practice has occurred. *See N.L.R.B. v. Dillion Stores*, 643 F.2d 687 (10th Cir. 1981); *N.L.R.B. v. First Nat. Bank of Pueblo*, 623 F.2d 686 (10th Cir. 1980); *N.L.R.B. v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980), *cert. denied*, ... U.S. ..... (1981). The Board's order was impermissibly tainted by the presumption's application.[4]

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[3] To the extent that *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979) is contrary, we decline to follow it.

[4] The decision and order of the Board was entered on stipulation of the parties. This does not, however, change our views. That stipulation, specifically approved by the Board, provides in part:

> It is agreed that this case shall be in the same posture before the United States Court of Appeals for the Tenth Circuit as it would have been if the standard procedures

(Footnote continued on following page)

(b)

We do not rest our decision on this ground alone. In our view, any use of a presumption which casts doubt upon the Medical Center the burden of producing evidence of the inappropriateness of the unit violates Congress' directive of avoiding nonproliferation in the health care industry. The legislative history underlying the 1974 amendments expresses concern that egregious unit proliferation such as found in the construction trades, could impede effective health care delivery. We agree with our sister circuits that "the Board *must* expressly consider the congressional admonition in making unit determinations," *Mary Thompson Hospital, Inc. v. N.L.R.B.*, *supra*, at p. 864, and focus on the "disparity of interests between employee groups which would prohibit or inhibit fair representation of employee interests." *N.L.R.B. v. St. Francis Hospital of Lynwood*, *supra*, at p. 419.

We hold that requiring health care industry employers to bear the burden of producing evidence that limited bargaining units are more inappropriate than broader bargaining units runs contrary to Congress' admonition. Rather, the Board must specify "the manner in which its unit determination in this case implement[s]

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[4] *continued*

had been followed, i.e., after a Complaint had issued, the Employer would have filed an answer defending the allegations on the grounds that the bargaining unit is inappropriate, the Union would have moved for summary judgment, the Employer would have responded to the motion again asserting the bargaining unit defense, the National Labor Relations Board would have granted the motion for summary judgment, and the Employer would have then appealed to the United States Court of Appeals for the Tenth Circuit.

or reflect[s] that admonition." *N.L.R.B. v. West Suburban Hospital, supra,* at p. 216.

"The power of an administrative . . . board to administer a federal statute and to prescribe rules and regulations to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. [An administrative decision] which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *United States v. Larionoff,* 431 U.S. 864, 873 n. 12 (1977), *quoting Manhattan General Equip. Co. v. Commissioner,* 297 U.S. 129, 134 (1936).[5]

Conclusion

We must give "due observance [to] the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution." *F.C.C. v. Pottsville Broadcasting Co.,* 309 U.S. 134, 141 (1940). Recognizing this, our function "ends when an error of law is laid bare." *F.P.C. v. Idaho Power Co.,* 344 U.S. 17, 20 (1952). At that point, our only recourse is to remand to the Board for reconsideration in light of our holding.

"Application of that general principle in this case best respects the congressional scheme investing the Board and not the courts with broad powers to fashion remedies that will effectuate national labor policy." *N.L.R.B. v. Food Store Employees,* 417 U.S. 1, 10 (1974).

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[5] For these same reasons, the Board erred in applying its single facility presumption to the issue of unit scope. *See infra.*

See also, South Prairie Construction Co. v. Local 627, Intern. Union of Operating Engineers, 425 U.S. 800 (1976) (per curiam). "For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Securities Comm'n. v. Chenery Corp.*, 318 U.S. 80, 88 (1943).[6]

The petition for review is granted. The cross-application for enforcement is denied. The cause is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

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[6] In our case remand is especially justified. Following the decision in this case, the Board reconsidered its prior opinions in the health care industry as regards registered nurse units. *See Newton-Wellesley Hospital*, 250 NLRB No. 86 (1980). *See also: National Medical Convalescent of San Diego*, 254 NLRB No. 163 (1981); *Doctor's Hospital of Montclair*, 254 NLRB No. 175 (1981); *Federick Memorial Hospital, Inc.*, 245 NLRB No. 2 (1981); *Addison Gilbert Hospital*, 253 NLRB No. 141 (1981); *Mount Airy Foundation*, 253 NLRB No. 139 (1981); and *Brookwood Hospital Management Corp.*, 252 NLRB No. 107 (1980). An appellate court reviewing an agency decision following an intervening change of policy should remand to permit the agency to decide in the first instance whether it should reframe its order to better effectuate the policies underlying the Act it is charged with administering. *NLRB v. Food Store Employees, supra*, at p. 10. In this connection we note our disagreement with the Board's view that the "community of interests" test and the "disparity of interests" test are essentially identical. It is not the similarity of employees' training, hours, conditions and activities which determine the appropriateness of the unit. It is, rather, the dissimilarity of interests relevant to the collective bargaining process that determines which employees are not be to included in a proposed unit. The proper approach is to begin with a broad proposed unit and then exclude employees with disparate interests. One should not start with a narrow unit, such as registered nurses, and then add professionals with similar interests.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
No. 80-1942—Filed July 20, 1981

BETH ISRAEL HOSPITAL AND GERIATRIC CENTER,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

BETH ISRAEL FEDERATION OF NURSES AND HEALTH PROFESSIONALS AFT/FNHP, CFT, AFL-CIO,
Intervenor.

On Petition for Review and Cross-Application For Enforcement of an Order of The National Labor Relations Board (Case No. 37-CA-6658)

John D. Coombe (John M. Husband with him on the brief), of Holland & Hart, Denver, Colorado, for Petitioner-Appellant.

Linda Dreeben, Attorney (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, and John H. Ferguson, Attorney, with her on the brief), National Labor Relations Board, Washington, D.C., for Respondent-Appellee.

Michael Radzilowsky (Lawrence A. Poltrock and Stephen G. Daday with him on the brief), of DeJong, Poltrock — Giampietro, Chicago, Illinois, for Intervenor.

Robert J. Janowitz and Gina Kaiser of Roan & Grossman, Kansas City, Missouri, filed an amicus curiae brief for American Hospital Association.

Before BARRETT and LOGAN, *Circuit Judges*, and O'CONNOR, *District Judge.**

BARRETT, *Circuit Judge.*

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*Of the United States District Court for the District of Kansas, sitting by designation.

Beth Israel Hospital and Geriatric Center (Beth Israel) appeals from a National Labor Relations Board (Board) order directing that it bargain with Beth Israel Federation of Nurses and Health Professionals, FNHP/AFT, CFT, AFL-CIO (Union).

Beth Israel is a non-profit corporation operating a hospital, health care institution and geriatric center in Denver, Colorado, under the direction and supervision of a board of directors, administrators, and various administrative support personnel. It operates a combined 300-bed acute care hospital and a 140-bed long term geriatric center. It employs approximately 682 persons, of whom 132 are registered nurses.

On August 31, 1979, Union filed a petition seeking certification as the exclusive representative for a unit comprised of the registered nurses employed at Beth

Israel. Thereafter, the Board conducted a four day hearing to determine the appropriateness of Union's requested unit, limited exclusively to registered nurses. Beth Israel maintained that an appropriate unit should include its professional employees with whom the registered nurses worked and shared a significant amount of patient care responsibilities. In support thereof, Beth Israel noted that all of its professional employees are subject to centralized hospital management and centralized labor management relations; all share common working conditions; all have common educational requirements; all professionals are required to have licenses, certification, or registration; all share a primary responsibility to the patient; all exercise independent judgment; and, all health care professionals work together in a highly integrated operation.

Beth Israel also argued that Congress, in amending the National Labor Relations Act in 1974 to include employees of non-profit health care institutions, directed the Board to avoid the undue proliferation of bargaining units in the health care industry. Beth Israel further argued that Union's proposed unit comprised exclusively of registered nurses was in direct violation of Congress' mandate and, as such, could not be considered a presumptively appropriate unit.

Within his "Decision and Direction of Election" upholding the appropriateness of a unit limited exclusively to registered nurses, Board's Regional Director held:

> The main area of dispute is whether the unit should be restricted to registered nurses . . . or whether the unit should be an all professional unit . . . The Board has consistently held that a unit restricted to registered nurses is a presumptively appropriate one . . . The record discloses that the presumption that registered nurses at Beth Israel constitute an

> appropriate unit has *not been overcome* by Employer's [Beth Israel] evidence . . . The contacts that the registered nurses have with the other professional employees is of a limited and routine nature. The contacts had by registered nurses with other registered nurses is substantially greater . . . The above facts establish the "singularity" of interest shared by the registered nurses, and I, therefore, find that the requested unit of registered nurses at Beth Israel is an appropriate one.
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> [R., Vol. III, at p. 956].

On January 25, 1980, following a Board election, Union was duly certified as the exclusive collective bargaining representative of registered nurses only employed at Beth Israel. Thereafter, commencing on or about March 27, 1980, Beth Israel refused, and has continued to refuse to bargain collectively with Union, contending that a unit limited exclusively to registered nurses is inappropriate.

On April 30, 1980, Beth Israel and Union jointly filed a Stipulation for an Entry of Order with the Regional Director in which Beth Israel reiterated its position that a unit comprised exclusively of registered nurses was inappropriate. Subsequent thereto, the Board, pursuant to a motion filed by the General Counsel, transferred the proceeding to itself for findings of fact, conclusions of law and the issuance of a decision and order.

On August 26, 1980, Board entered its decision and order upholding the Regional Director's earlier determination that a unit limited exclusively to registered nurses employed by Beth Israel was appropriate. In so doing, the Board found, *inter alia*:

> In their joint motion, all parties stipulated that the Union was certified as the bargaining representative for an appropriate unit of registered nurses

pursuant to a Board conducted election on January 16, 1980. Since the submission of the joint motion herein, the Board has had occasion in its recent decision in *Newton-Wellesley Hospital*, 250 NLRB No. 86, to reexamine the appropriateness of a unit of registered nurses and to consider contentions that the Board had been finding registered nurses units appropriate *per se* without evaluating countervailing evidence concerning the relationship between registered nurses and other professional employees. After a thorough examination of all of the evidence in *Newton-Wellesley*, we concluded that the registered nurses there comprised a separate appropriate unit. Here, while the Regional Director issued his decision in the underlying representation case without the benefit of *Newton-Wellesley*, he received and considered all of the evidence presented by Respondent as to the appropriateness of the petitioned-for unit and examined all of the Board's community of interest factors in detail. Upon doing so, the Regional Director concluded that the requested unit of registered nurses here was an appropriate unit for collective bargaining. Having examined this conclusion in light of *Newton-Wellesley*, we reaffirm the Regional Director's decision.

[R., Vol. III, at p. 1002].

In affirming the Regional Director, the Board implicitly affirmed his finding that "The record discloses that the presumption that registered nurses at Beth Israel constitute an appropriate unit has *not been overcome* by Employer's evidence." [R., Vol. III, at p. 956]. On appeal we need only consider the validity of applying this presumption in the case at bar.

We recently addressed the same question in *Presbyterian/St. Luke's Medical Center v. National Labor Relations Board*, ... F.2d ..... (10th Cir. 1981) (No. 80-1426, decided July 8, 1981). There, as here, the

same Regional Director ruled that a unit restricted to registered nurses is presumptively appropriate and that, based on the Board's singularity of interests analysis, the presumption in favor of the registered nurses unit was not overcome by the Medical Center. *Presbyterian/St. Luke's Medical Center, supra,* held that application of the presumption violated Federal Rule of Evidence 301[1] inasmuch as it relieved General Counsel of his burden to establish by a preponderance of the evidence that an unfair labor practice had occurred. We thus opined that the Board's order was impermissibly tainted by application of the presumption in that any use of the presumption "which casts upon the Medical Center the burden of producing evidence of the inappropriateness of the unit violates Congress' directive of avoiding non-proliferation in the health care industry. The legislative history underlying the 1974 amendments expresses concern that egregious unit proliferation such as found in the construction trades, could impede effective health care delivery." [Sl. Op. at p. 14].

We deem it important to relate here, just as we did in *Presbyterian/St. Luke's Medical Center, supra,* that the House and Senate committee reports addressing this problem, *each* stated:

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center,* 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital,* 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West*

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[1] Fed. Rules Evid. rule 301, 28 U.S.C.A.

Virginia, 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]

[1] By our reference to *Extendicare*, we do not necessarily approve of all of the holdings of that decision.

S.Conf. Rep. No. 988, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News pp. 3946, 3950; S.Rept. No. 766, 93d Cong., 2d Sess. 5 (1974); H.Rept. No. 1051, 93d Cong., 2d Sess. 7 (1974).

[Sl. Op. at p. 5].

It is our view that the import of the reports was very clear, i.e., that the Board should give "due consideration" to prevent proliferation of bargaining units in the health care industry *and* recognize the trend toward broader units.

Our holding in *Presbyterian/St. Luke's Medical Center*, *supra*, is fully applicable to the case at bar. The Board should no longer consider a unit restricted to registered nurses as a presumptively appropriate one. This presumption is, and has been since the 1974 amendments to the Act, unwarranted and in direct contradiction to the congressional mandate that the Board is to avoid the undue proliferation of bargaining units in the health care industry and that it is to consider the trend toward broader units.

In summary, we hold that the Board erred in applying its prior decisions finding/concluding that a unit restricted exclusively to registered nurses is presumptively appropriate and that an employer must overcome the presumption by producing evidence that limited bargaining units are less appropriate than broader bargaining units. Continued acceptance and endorsement of Board's presumptive and evidentiary policies by this Court would simply serve to enhance the undue

proliferation of health care bargaining units, in direct derogation to the congressional mandate set forth in the House and Senate committee reports, *supra*. This we decline to do.

The petition for review is granted. The cross-application for enforcement is denied. The cause is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
No. 80-1968—Filed August 4, 1981

ST. ANTHONY HOSPITAL SYSTEMS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

ST. ANTHONY'S FEDERATION OF NURSES AND HEALTH PROFESSIONALS,

Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board (No. 27-CA-6723)

Earl K. Madsen (Lawrence W. Marquess with him on the brief) of Bradley, Campbell & Carney, Golden, Colorado, for Petitioner.

Charles P. Donnelly (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, and John G. Elligers, Attorney, with him in the brief), National Labor Relations Board, Washington, D.C., for Respondent.

Michael Radzilowsky (Lawrence A. Poltrock and Stephen G. Daday with him on the brief) of DeJong, Poltrock, & Giampietro, Chicago, Illinois, for Intervenor.

Before BARRETT and LOGAN, *Circuit Judges*, and O'CONNOR, *District Judge.**

LOGAN, *Circuit Judge.*

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* Honorable Earl E. O'Connor of the United States District Court for the District of Kansas, sitting by designation.

St. Anthony Hospital Systems petitions for review of a decision and order of the National Labor Relations Board (NLRB or Board) finding the hospital engaged in unfair labor practices by refusing to bargain with St. Anthony's Federation of Nurses and Health Professionals/AFT/FNHP, CFT, AFL-CIO (the union). The only issues raised on appeal are whether the Board (1) unconstitutionally asserted jurisdiction over the hospital, which is argued to be exempt under the First Amendment from governmental regulation because it is owned and operated by the Roman Catholic Church, (2) erred in ruling that a unit composed only of registered nurses is an appropriate bargaining unit under section 9(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 159(b), and (3) erred in holding that individuals classified as Staff Nurse I were not supervisors within the meaning of section 2(11) of the NLRA, 29 U.S.C. § 152(11).

St. Anthony Hospital Systems (St. Anthony), consisting of a main or central building and a satellite facility, is a non-profit medical institution owned and operated by the Sisters of the Order of St. Francis, a Roman Catholic Order. In 1979 the union filed a representation petition with the NLRB, seeking certification as the exclusive bargaining representative of all nonsupervisory registered nurses employed by the hospital. Following a hearing at which St. Anthony unsuccessfully challenged the appropriateness of the requested bargaining unit, the Board's regional director issued a direction of election in the registered nurse unit. The Board denied St. Anthony's request for review. A majority of the eligible employees voted in favor of representation by the union, following which the director certified the union as the exclusive collective bargaining representative for the hospital's professional registered nurse employees. St. Anthony has obtained judicial review of the unit determination by refusing to bargain with the union. *See* Magnesium Casting Co. v. NLRB, 401 U.S. 137, 139 (1971); Osteopathic Hosp. Founders Ass'n v. NLRB, 618 F.2d 633, 640 (10th Cir. 1980). In its answer to the complaint issued by the General Counsel of the NLRB, St. Anthony claimed the Board's assertion of jurisdiction was unconstitutional on the ground that the hospital is a religious organization exempt from intrusive governmental regulation under the First Amendment. It also denied that the union was a proper labor organization under the NLRA, challenged the appropriateness of the unit determination, and objected to the inclusion of Staff Nurse I employees in the bargaining unit, claiming they were supervisors within the meaning of 29 U.S.C. § 152(11). The Board granted the General Counsel's motion for summary judgment, ordering St. Anthony to cease and desist from

its unfair labor practices and directing it to bargain collectively with the union. The case is before this Court on St. Anthony's petition for review of the Board's order and the Board's application for enforcement. The union is present as intervenor.

The record indicates that St. Anthony failed to object to jurisdiction during the representation proceeding and first asserted its First Amendment challenge to jurisdiction in the unfair labor practice proceedings before the Board. Apparently relying on section 102.67(f) of its Rules and Regulations, 29 C.F.R. § 102.67(f) (1980),[1] the Board determined St. Anthony was not entitled to litigate the constitutional issue which could have been, but was not, raised in the prior representation proceeding. In *NLRB v. Peyton Fritton Stores, Inc.*, 336 F.2d 769, 770 (10th Cir. 1964), we held that while the statutory jurisdiction of the Board may be challenged at any time, "the *facts* upon which the Board determines it has jurisdiction may be challenged only upon timely exception, in the absence of which the Board's findings are not open to attack in the proceeding for enforcement." (Emphasis added.) The Board's non-relitigation rule protects the integrity of the administrative process by requiring a party to develop all arguments and present all available, relevant evidence at the representation

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[1] 29 C.F.R. § 102.67(f) provides in pertinent part:

> "(f) . . . Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. *Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.*"

(Emphasis added.)

proceeding, the first instance in which the Board exercises jurisdiction. It would indeed be a waste of time, money, and effort if an employer could remain silent on this issue throughout the representation proceeding, refuse to bargain after certification, then ultimately defeat unionization on constitutional grounds asserted for the first time in the ensuing unfair labor practice proceeding. We affirm the Board's determination that the First Amendment issue, having been untimely raised, was not cognizable by the Board in the underlying unfair labor practice hearing. The issue is therefore not properly before this Court on St. Anthony's petition for review. See Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 162 (1941). *Cf.* St. Elizabeth Community Hosp. v. NLRB, 626 F.2d 123 (9th Cir. 1980) (First Amendment challenge to jurisdiction was timely only because raised in representation proceeding and not deferred until the enforcement proceedings).

The issues concerning whether the nurses should be a separate bargaining unit and whether those classified as Nurse I were supervisors were raised before the Regional Director and the Board in the representation proceedings and may be reviewed here. *See* Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 154 (1941); NLRB v. Jackson Farmers, Inc., 432 F.2d 1042 (10th Cir. 1970), *cert. denied*, 401 U.S. 955 (1971). The Board has been granted broad discretion in determining appropriate bargaining units, and its decisions will be set aside only if shown to be arbitrary or capricious. NLRB v. Dewey Portland Cement Co., 336 F.2d 117, 119 (10th Cir. 1964). Hence, it is our function on review to determine whether the Board, when exercising the wide discretion committed to it, has stayed within the purview of the authorizing statutes. NLRB v. Groendyke, 372 F.2d 137, 140 (10th Cir. 1967), *cert. denied*, 397 U.S. 935

(1970). In granting the General Counsel's motion for summary judgment and affirming the Regional Director's decision, the Board clearly seems to have accepted the director's reasoning, based on *Mercy Hospitals of Sacramento, Inc.*, 217 N.L.R.B. 765 (1975), and *Allegheny General Hospital*, 239 N.L.R.B. 872 (1978), "that a unit restricted to registered nurses is a presumptively appropriate one," and that in this case "the presumption . . . has not been overcome by the Employer's evidence." R. Vol. V. at 3244. *See id.* at 3311. Acknowledging *NLRB v. St. Francis Hospital of Lynwood*, 601 F.2d 404 (9th Cir. 1979), the Regional Director and the Board applied a rebuttable presumption that the nurse unit was appropriate. Nevertheless, we believe the opinions clearly do not go far enough in following the congressional directive. *See* R. Vol. V at 3244-45, 3311-12.

On the appropriate unit issue, the case at bar is identical in all significant respects to *Presbyterian/St. Luke's Medical Center v. NLRB*, No. 80-1426 (10th Cir. July 7, 1981), in which we held the Board's application of the rebuttable presumption both impermissibly shifts the burden of persuasion and violates Congress' directive to avoid proliferation of bargaining units in the health care industry. Our holding in *Presbyterian/St. Luke's Medical Center* is fully applicable to this case. We hold the Board's unit determination, based on the presumption of appropriateness and a duty in the employer to overcome it, improperly relieved the General Counsel of the burden to establish that an unfair labor practice occurred. Because our holding on this issue renders the Board's order unenforceable, we find it unnecessary to address St. Anthony's remaining contention that the Board improperly included Staff Nurse I employees in the bargaining unit.

The petition for review is granted. The cross-application for enforcement is denied. The cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX D

Denver, Colo.

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 27-CA-6574-2

PRESBYTERIAN/ST. LUKE'S
MEDICAL CENTER

and

ST. LUKE'S FEDERATION OF NURSES
AND HEALTH PROFESSIONALS, AFT,
AFL-CIO

DECISION AND ORDER

Upon charges duly filed, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 27, issued a complaint and notice of hearing on March 4, 1980, and on March 20, 1980, an amendment thereto, against Presbyterian/St. Luke's Medical Center, herein called Respondent, alleging that Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing were duly served on the parties.

With respect to the unfair labor practices, the complaint alleges in substance that on January 24, 1980, following a Board election in Case 27-RC-5935, the Union was duly certified as the exclusive collective-

bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about February 12, 1980, and at all times thereafter, Respondent has refused, and continues to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 14, 1980, the Respondent filed its answer to the complaint, and on March 21, 1980, an answer to the amended complaint.

Thereafter, on March 18, 1980, Respondent and the Union filed jointly with the Regional Director for Region 27 a Stipulation for Entry of Order wherein the Respondent asserted that the Board erred in directing an election in Case 27-RC-5935 among the unit employees herein involved.[2] The parties agreed that a decision and order on the complaint should issue to enable the Respondent to seek review of the Board's unit determination by the United States Court of Appeals for the Tenth Circuit, that an order be entered directing the Respondent to bargain with the Union as the exclusive bargaining representative of registered nurses employed at the Respondent's St. Luke's facility and without the necessity for any further procedural action.

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[1] Official notice is taken of the record in the representation proceeding, Case 27-RC-5935, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] On January 8, 1980, the Board denied the Employer's request for review of the Regional Director's Decision and Direction of Election.

On March 27, 1980, the General Counsel filed with the Board a Motion for Issuance of Decision and Order moving that the Board transfer the proceeding to itself and issue a Decision and Order finding that the Respondent has violated the Act as alleged.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board hereby approves the Stipulation, grants the General Counsel's motion, and the proceeding is hereby transferred to and continued before the Board in Washington, D.C., for the making of findings of fact, conclusions of law, and the issuance of a decision and order.

Upon the basis of the Stipulation and the entire record in the case, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is now, and at all times material has been, a corporation duly organized under and existing by virtue of the laws of the State of Colorado and maintains its principal office and place of business at Denver, Colorado, where it is engaged in the operation of an acute care hospital facility.

Respondent, in the course and conduct of its business operations annually has a gross volume of business in excess of $250,000 and purchases and receives goods and materials valued in excess of $50,000 directly from points and places outside the State of Colorado.

Respondent admitted, and we find, that it is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Respondent admitted, and we find, that St. Luke's Federation of Nurses and Health Professionals, AFT, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

Since on or about February 12, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the appropriate unit. Commencing on or about February 12, 1980, and at all times thereafter, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive collective-bargaining representative of all employees in the appropriate unit.

We find that Respondent has, since February 12, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III above, occurring in connection with its operations

described in section I above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

Upon the basis of the foregoing findings of fact and the entire record, the Board makes the following:

Conclusions of Law

1. Presbyterian/Saint Luke's Medical Center is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. St. Luke's Federation of Nurses and Health Professionals, AFT, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time registered nurses, including in-service education nurses, cardiovascular specialists, diabetic stroke technicians, hyper-elementation nurse clinicians, float pool nurses, certified anesthetists, and all other registered nursing employees at the St. Luke's facility of the employer located at 601 E. 19th Avenue, Denver, Colorado; but ex-

cluding unit supervisors, assistant unit supervisors, department directors, assistant department directors, patient representatives and other supervisory and managerial employees, and guards as defined in the Act and all other employees of the above facility, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 24, 1980, the above-named labor organization has been and is now the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 12, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Presbyterian/Saint Luke's Medical Center, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with respect to rates of pay, wages, hours of employment and other terms and conditions of employment with St. Luke's Federation of Nurses and Health Professionals, AFT, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time registered nurses, including in-service education nurses, cardiovascular specialists, diabetic stroke technicians, hyper-elementation nurse clinicians, float pool nurses, certified anesthetists, and all other registered nursing employees at the St. Luke's facility of the employer located at 601 E. 19th Avenue, Denver, Colorado; but excluding unit supervisors, assistant unit supervisors, department directors, assistant department directors, patient representatives and other supervisory and managerial employees, and guards as defined in the Act and all other employees of the above facility.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the National Labor Relations Board finds will effectuate the policies of the National Labor Relations Act, as amended:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect

to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Denver, Colorado, place of business copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C., April 14, 1980.

JOHN H. FANNING
Chairman

HOWARD JENKINS, JR.
Member

JOHN C. TRUESALE
Member

NATIONAL LABOR RELATIONS BOARD

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[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with St. Luke's Federation of Nurses and Health Professionals, AFT, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time registered nurses, including in-service education nurses, cardiovascular specialists, diabetic stroke technicians, hyper-elementation nurse clinician, float pool nurses, certified anesthetists, and all other registered nursing employees at the St. Luke's facility of the Employer located at 601 E. 19th Avenue, Denver, Colorado; but excluding unit supervisors, assistant unit supervisors, department directors, assistant department directors, patient representatives and other supervisory and

managerial employees, and guards as defined in the Act and all other employees of the above facility.

PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER
(Employer)

Dated _____

By _____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 260, U.S. Custom House, 721 - 19th Street, Denver, Colorado 80202. Telephone 303-837-3553.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Case No. 27-CA-6574-2

ST. LUKE'S FEDERATION OF NURSES AND HEALTH PROFESSIONALS, AFT, CFT, AFL-CIO,
Charging Party

and

PRESBYTERIAN/ST. LUKE'S MEDICAL CENTER,
Employer.

STIPULATION FOR ENTRY OF ORDER

1. St. Luke's Federation of Nurses and Health Professionals, AFT, CFT, AFL-CIO, hereinafter referred to as the "Union", and Presbyterian/St. Luke's Medical Center, hereinafter referred to as the "Employer", were parties to a representation matter before the National Labor Relations Board in Case No. 27-RC-5935.

2. A hearing in Case No. 27-RC-5935 was held before a Hearing Officer of the National Labor Relations Board on November 6, 7, 8, 13 and 14, 1979, in Denver, Colorado. The Union and the Employer had full opportunity to introduce any and all evidence that either party desired. Subject to any objections which either party may have made during the course of the hearing, the Union and the Employer agree that the record in Case No. 27-RC-5935 is complete on the issue of the appropriateness of the bargaining unit.

3. On December 11, 1979, the Regional Director issued his Decision and Direction of Election. The Regional Director rejected the position of the Employer that the appropriate unit should be all professional

employees employed by the Employer and directed an election among only registered nurses at the Employer's St. Luke's facility. This direction excluded professional employees, other than registered nurses, at the St. Luke's campus, and also excluded all registered nurses and other professional employees employed at the Employer's Denver Presbyterian and Aurora Presbyterian facilities. The Employer filed a timely Request for Review. The Request for Review was denied by the National Labor Relations Board on January 8, 1980.

4. An election was held on January 10, 1980, in which the Union received a majority of the valid votes cast.

5. Immediately thereafter, the Employer advised all employees that it would refuse to bargain with the Union because the Employer did not believe that the bargaining unit determination properly implemented Congress' directive to avoid proliferation of bargaining units in the health care industry.

6. On January 24, 1980, the National Labor Relations Board certified the Union as the exclusive bargaining representative of the registered nurses at the Employer's St. Luke's facility.

7. Thereafter, the Union asked the Employer to agree that the Employer's refusal to bargain would be resolved in an expedited manner as follows: (a) the Union would make a written request for bargaining (Appendix 1); (b) the Employer would make a written refusal of that request (Appendix 2); and (c) the Union would file an unfair labor practice charge with the Regional Office of the National Labor Relations Board (Appendix 3). The parties would then enter into this Stipulation for the Entry of an Order by the National Labor Relations Board with the reservations contained

herein. Upon entry of the order by the National Labor Relations Board, the Employer would immediately file an appeal in the United States Court of Appeals for the Tenth Circuit. By this procedure, the parties would significantly expedite the resolution of the bargaining unit issue.

8. The parties have agreed that the procedure outlined above, if approved by the Board, will be the procedure that the parties will follow to resolve the Employer's refusal to bargain that is alleged in Case No. 27-CA-6574-2.

9. The Employer's refusal to bargain is for the sole purpose of having the United States Court of Appeals for the Tenth Circuit determine the following issues:

(a) Whether the National Labor Relations Board erred in directing an election among employees at the Employer's St. Luke's facility only, rather than also including employees at the Employer's Denver Presbyterian and Aurora Presbyterian facilities.

(b) Whether the National Labor Relations Board erred in directing an election among registered nurses only, rather than also including other professional employees.

10. The Employer, by entering into this stipulation, reserves all legal rights that it has to appeal the issues set forth in paragraphs 9(a) and 9(b) to the United States Court of Appeals for the Tenth Circuit, and to the United States Supreme Court, for determination. The only right that is waived by the Employer is the right to any further consideration of these issues by the National Labor Relations Board. It is agreed that this case shall be in the same posture before the United States Court of Appeals for the Tenth Circuit as it would have been if the standard procedures had been followed, i.e., after a

Complaint had issued, the Employer would have filed an answer defending the allegations on the grounds that the bargaining unit is inappropriate, the Union would have moved for summary judgment, the Employer would have responded to the motion again asserting the bargaining unit defense, the National Labor Relations Board would have granted the motion for summary judgment, and the Employer would have then appealed to the United States Court of Appeals for the Tenth Circuit.

WHEREFORE, the parties do jointly request that the National Labor Relations Board enter an order directing the Employer to bargain with the Union as the exclusive bargaining representative of registered nurses employed at the Employer's St. Luke's facility. The parties request that this order be entered without the necessity for any further procedural action and that it be entered as soon as possible.

ST. LUKE'S FEDERATION OF
NURSES AND HEALTH PROFESSIONALS,
AFT, CFT, AFL-CIO

By /s/ MICHAEL RADZILOWSKY
Attorney

DEJONG, POLTROCK & GIAMPIETRO

PRESBYTERIAN/ST. LUKE'S MEDICAL
CENTER

By /s/ CLIFTON L. ELLIOTT
Attorney

By /s/ GINA KAISER
Attorney

ROAN & GROSSMAN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRESBYTERIAN/ST. LUKE'S MEDICAL CENTER,[1]	Employer,
and	
ST. LUKE'S FEDERATION OF NURSES AND HEALTH PROFESSIONALS/AFT, CFT, AFL-CIO,	Petitioner,
and	
UNITED NURSES, PROFESSIONALS AND HEALTH CARE EMPLOYEES, LOCAL SEVEN - UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO,	Intervenor,
and	
COLORADO NURSES' ASSOCIATION, AFFILIATE OF THE AMERICAN NURSES' ASSOCIATION,	Intervenor.

CASES NOS. 27-RC-5934 and 27-RC-5935

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.[2]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

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[1] See page 48a, *infra*.

[2] See page 48a, *infra*.

[3] See pages 48a-54a, *infra*.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

CASE NO. 27-RC-5934: All full-time and regular part-time licensed practical nurses (I and II) operating room technicians, radiological technicians, nuclear medicine technicians, laboratory technicians, EKG technicians, respiratory technicians, medical records technicians, cardiovascular technicians, pulmonary function technicians and perfusionists employed at St. Luke's facility located at 601 E. 19th Avenue in Denver, Colorado, 80203; excluding all professional employees, guards and supervisors defined in the Act.

CASE NO. 27-RC-5935: All full-time and regular part-time registered nurses, including in-service education nurses, cardiovascular specialists, diabetic stroke technicians, hyper-elementation nurse clinician, float pool nurses, certified anesthetists, and all other registered nursing employees at the St. Luke's facility of the employer located at 601 E. 19th Avenue in Denver, Colorado; and excluding: unit supervisors, assistant unit supervisors, department directors, assistant department directors, patient representatives and other supervisory and managerial employees, and guards as defined in the Act and all other employees of the above facility.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately before the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as

such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by *Case No. 27-RC-5934*—St. Luke's Federation of Nurses and Health Professionals/AFT, CFT, AFL-CIO, *Case No. 27-RC-5935*—St. Luke's Federation of Nurses and Health Professionals/AFT, CFT, AFL-CIO, *OR* United Nurses, Professionals and Health Care Employees, Local Seven—United Food and Commercial Workers, AFL-CIO *OR* Colorado Nurses' Association, Affiliate of the American Nurses' Association.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 6 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge, Subregion, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the 27th Regional Office, 260 New Custom House, 721-19th Street, Denver, Colorado on or before December 18, 1979. No extension of time to file this list may be

granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570. This request must be received by the Board in Washington by December 24, 1979.

Dated December 11, 1979
at Denver, Colorado

/s/ W. BRUCE GILLIS, JR.
(SEAL) Regional Director, Region 27

FOOTNOTES

[1] The name of the Employer appears as amended at the hearing.

[2] St. Luke's Federation of Nurses and Health Professionals/AFT, CFT, AFL-CIO (herein St. Luke's Federation) filed petitions in Case Nos. 27-RC-5934 and 27-RC-5935 on October 5, 1979. On November 6, 1979, the United Nurses, Professional and Health Care Employees, Local Seven—United Food and Commercial Workers, AFL-CIO (herein Local Seven) and the Colorado Nurses' Association, affiliate of the American Nurses' Association (herein CNA) were permitted to intervene in Case No. 27-RC-5935.

[3] The Employer is a non-profit, licensed corporation engaged in providing acute patient care in Denver and Aurora, Colorado. The Employer's present corporate structure came into existence on July 2, 1979, as a result of a merger between two previously separate entities, St. Luke's Hospital Association and Presbyterian Medical Center. The St. Luke's facility was, and is, a self-contained tertiary hospital offering a full

complement of services to patients. Presbyterian operated its main facility in Denver with a satellite Aurora facility. The Presbyterian facilities shared a number of departments and services. See *Presbyterian Medical Center*, 218 NLRB 192. The Center is now a three-hospital system, with two of the hospitals (St. Luke's and Presbyterian Denver) located approximately ten blocks apart in Denver, Colorado. Presbyterian Aurora is ten miles away in Aurora, Colorado. The Employer's hospitals house an approximate total of 1037 beds, with 465 at St. Luke's, 438 at Presbyterian Denver, and 134 at Aurora Presbyterian. The Employer employs approximately 3000 employees. There are approximately 305 registered nurses at St. Luke's and 368 at the Presbyterian facilities. There has been no bargaining history at any of the facilities.

In the State of Colorado there are very few hospitals which have collective bargaining agreements. Two Veterans hospitals in Denver and Ft. Lyons, Colorado and the Boulder Medical Clinic have agreements covering units restricted to registered nurses. The hospital in Glenwood Springs is unique in that the unit includes both registered nurses and non-professional employees.

In this later case I have taken official notice of my decision in *Valley View Hospital Association* (27-RC-5808) which is the Glenwood Springs facility in question. I note that the registered nurses were included in that general, non-professional unit because the parties in that case stipulated that the RN's at that particular facility were *not* employed as professionals.

As amended at the hearing, the Petitioner seeks in Case No. 27-RC-5934 a unit of all full-time and regular part-time licensed practical nurses (I and II), operating room technicians, radiological technicians, nuclear medicine technicians, laboratory technicians, EKG technicians, respiratory technicians, medical records technicians, cardiovascular technicians, pulmonary function technicians, and non-registered nurse perfusionists employed at the St. Luke's facility located at 601 E. 19th Avenue in Denver, Colorado 80203; excluding all professional employees, guards and supervisors as defined in the Act. Local Seven and CNA are not intervenors in this petition. The Employer's position is that the all-technical unit is proper, but should include certain job classifications which the Petitioner believes to be professional and not properly included. The Employer would also argue that the only appropriate unit is an all-technical unit for all three facilities, rather than one limited to St. Luke's.

As amended at the hearing, the Petitioner and Intervenors seek, in Case No. 27-RC-5935, a unit of all full-time and regular part-time registered nurses, including specifically in-service education nurses, cardiovascular specialists, diabetic stroke technicians, hyper-elementation nurse clinician, float pool nurses, certified anesthetists, and all other registered nursing employees at the St. Luke's facility of the Employer located at 601 E. 19th Avenue in Denver, Colorado; and excluding unit supervisors, assistant unit supervisors, department directors, assistant department directors, patient representatives and other supervisory and managerial employees, and guards as defined in the Act, and all other employees of the above facility. The Employer's position is that an all-professional, systemwide unit is the only appropriate unit and not solely the St. Luke's registered nurse unit. In addition, the parties are in disagreement as to the inclusion of perfusionists and the systemwide on-call float nurses.

The Employer cites a number of factors supporting its argument for a systemwide unit. The Medical Center is centrally governed by a single board of directors elected from the predecessor boards. The overall management is through the central corporate office with John Casey serving as the president and chief executive officer. There exists a single employee newsletter for all three facilities. A new single logo for the Center has been developed. A single wage scale and set of benefits covers all employees, professional and non-professional, for all three facilities. In addition, there is a single affirmative action plan, seniority system, employee handbook, supervisor's manual, and grievance procedure. The record discloses a minimal amount of sharing of resources and interchange of employees.

It has long been the Board's position that a single-facility unit is presumptively appropriate where there is no bargaining history in a more comprehensive unit and the degree of integration with other facilities is insufficient to negate the separate identity of the facility in which a union seeks to become a representative. *Bourns, Inc.*, 217 NLRB 21. The record discloses that while a systemwide unit may be appropriate, the evidence does not rebut the presumption of the appropriateness of the single-hospital unit requested. While many of the Employer's policies and procedures are centrally controlled and uniformly applied, such centralization does not render a single unit inappropriate. *Samaritan Health Services, Inc.*, 238 NLRB No. 56. In the instant case, each facility has its own separate administrative staff below the corporate level. The administrators are responsible for the

day-to-day operation of their facilities. They exercise a significant degree of discretion in implementing the Employer's central policies. They have some degree of autonomy in their control of labor relations within their hospitals, as evidenced by the formation of a nurses' task force at St. Luke's, which was created solely to deal with the concerns of registered nurses, and direct communication from St. Luke's administrator to the nurses regarding labor relations. The facilities retain separate payrolls and accounting systems. There exists only a minimal amount of interchange of employees among the facilities. Each of the facilities does its own hiring and maintains its own personnel office. On the basis of the foregoing and the record as a whole, I find that St. Luke's maintains an identity separate from the corporate system of which it is a part. I, therefore, find that the Employer has failed to rebut the presumptive appropriateness of the single-facility units sought by the Petitioner and Intervenors. *Samaritan Health Services, Inc., supra.*

Having found that a single unit of technicians at St. Luke's is appropriate, there remains the question as to the inclusion of certain job classifications. The parties agreed that the job classifications listed in the petition are technical employees. In view of this agreement and the supporting record, I shall include them in the unit. The radiologic technologists, nuclear medicine technologists, radiation therapy technologists, ultrasound technologists, and dosimetrists are among the disputed job classifications. The Employer maintains that they are technical, while the Petitioner argues that they are professional and not properly within the unit. The evidence discloses that the five classes have evolved from the X-ray technician classification as science and medicine have continued to become more complex and specialized. The disputed classifications require qualifications beyond that of an X-ray technician. The education may be obtained at an academic institution, or in hospital-based training programs. Employees in the classes must also pass exams in order to be certified in their specialities. The evidence suggests that the employee classifications are technical. However, the record is insufficient to make such a determination. Accordingly, employees in these job classifications will be permitted to vote subject to challenge in the unit found appropriate in Case No. 27-RC-5934.

St. Luke's employs three perfusionists, two of whom are registered nurses. The parties have stipulated that the non-registered nurse perfusionist is a technical employee. The status of the registered nurse perfusionists remain in

question. The Petitioner argues that they are technical employees and should be included in the all technical unit. The Employer did not take a position as to the registered nurse perfusionists. An employee in this job classification is not required to be a registered nurse. The required minimum educational level is that of a scrub technicial, which is not a licensed position. An additional year of hospital training and certification is required of the perfusionists. In their position, they are responsible for operation and maintenance of the bypass (heart-lung) machine. All three of the perfusionists, regardless of their status as registered nurses, perform identical work. Record evidence indicates that employees in this job classification do not possess indicia of professional employees within the meaning of the Act, but rather, perform work of a technical nature. Accordingly, I shall include them in the unit found appropriate in Case No. 27-RC-5934. The fact that registered nurses currently occupy this position does not detract from the finding that the job classification itself is technical in nature and properly within that unit.

Before the merger and continuing to present, St. Luke's has maintained an on-call float pool of nurses, both registered and licensed practical nurses. The inclusion of these LPN's in the technical unit is not at issue. However, subsequent to the merger, the Center created a systemwide on-call float pool made up of both registered and licensed practical nurses. Unlike the LPN's in the St. Luke's float pool who work solely at St. Luke's, the LPN's in the systemwide pool will work in all three hospitals. The pool, at the time of the hearing, had ten registered and six licensed practical nurses. A goal of 25 nurses has been set by the Employer. It appears that as of the time of the hearing, the systemwide float pool nurses, other than an orientation session, have not worked at St. Luke's although the plans are for them to do so. Inasmuch as the St. Luke's float pool will continue to operate and it is speculative at best that the systemwide float pool LPN's will work a sufficient number of hours at St. Luke's and otherwise have a community of interest with the unit employees, I shall exclude the systemwide float pool LPN's from the unit. If there exist systemwide pool LPN's who have worked a substantial number of hours at St. Luke's, they will be permitted to vote subject to challenge.

Having found that a unit at a single hospital would be an appropriate one, the main area of dispute remaining in Case No. 27-RC-5935 is whether the unit should be restricted to registered nurses as the Petitioner and Intervenors ask, or whether the unit should be an all-professional unit as the

Employer argues. The Board has consistently held that a unit restricted to registered nurses is a presumptively appropriate one. *Mercy Hospitals of Sacramento*, 217 NLRB 765, *Allegheny General Hospital*, 239 NLRB No. 104. The Ninth Circuit Court of Appeals in *N.L.R.B. v. St. Francis Hospital of Lynwood*, 601 F. 2d 404, has held that this presumption cannot be an *irrebutable* one. The record discloses that the presumption, that registered nurses at St. Luke's constitute an appropriate unit, has *not been overcome* by the Employer's evidence. The RN's at St. Luke's are recruited and hired through a separate department of nursing, whereas the other employees at St. Luke's are recruited and hired through the personnel department. The nurses at the Presbyterian Denver and Aurora facilities are also recruited and hired by the overall personnel office. The Employer advertises for nurses by identifying the separate facility which will hire the employee. The registered nurses must possess certain educational requirements and pass a uniform national examination, and must be licensed by the State of Colorado. Their duties and responsibilities cannot be delegated to other hospital employees. The director of nursing at St. Luke's has significant control over the working conditions and hiring and firing of the registered nurses. The department of nursing at St. Luke's has organized a nursing task force to deal solely with the concerns of the nurses. This latter fact indicates that St. Luke's believes that the nurses are a separate group with common concerns. Unlike the vast majority of other employees, the registered nurses are scheduled 24 hours a day, 7 days a week. The contacts that the registered nurses have with the other professional employees is of a limited and routine nature. The contacts had by registered nurses with other registered nurses is substantially greater. Although, because of specialization, the nursing personnel cannot operate in each and every unit of the hospital, there are related units in which nurses do substitute. St. Luke's conducts a number of in-service educational classes directed only at nursing personnel. Registered nurses are the only professional employees that each and every patient would be in contact with during their hospital stay. They utilize extensive manuals with regard to their own operating procedures that are not shared with other professional employees. The above facts establish the "singularity" of interests shared by the registered nurses, and I, therefore, find that the requested unit of registered nurses at St. Luke's is an appropriate one. *Mercy Hospitals of Sacramento*, *supra*, *Allegheny General Hospital*, *supra*. In light of this finding, I

shall deny the Employer's motion to dismiss the petition in Case No. 27-RC-5935.

As discussed earlier, the Center has recently established a systemwide on-call float pool of nurses, including registered nurses. The finding and reasons for that finding reached with regard to the LPN's is equally applicable to the registered nurses. Hence, the systemwide float pool RN's are excluded from the unit. However, as with the LPN's, if there exist systemwide RN's who have worked a substantial number of hours at St. Luke's, they will be permitted to vote subject to challenge.

The parties have agreed that the following employee job classifications and employees are supervisors within the meaning of the Act: Assistant unit supervisors; Mary Lou Harvey, Director of Personnel; Levi Siebert, Director of Radiology; Pam VanGenderen; Pam Reinert; Hank Wedemeyer; Joyce Warren; Margaret Richbourg; JoAnne Sterling; Edward Alexander; John Casey; and Don Lenz. In view of this agreement, which is supported by the record, I shall exclude them from the appropriate units.

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BETH ISRAEL HOSPITAL AND GERIATRIC CENTER

Case 27-CA-6658

and

BETH ISRAEL FEDERATION OF NURSES AND HEALTH PROFESSIONALS, FNHP/AFT, CFT, AFL-CIO

DECISION AND ORDER

Upon charges duly filed, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 27, issued a complaint and notice of hearing on April 9, 1980, against Beth Israel Hospital and Geriatric Center, herein called Respondent, alleging that Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing were duly served on the parties.

With respect to the unfair labor practices, the complaint alleges in substance that on January 25, 1980, following a Board election in Case 27-RC-5911, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit

found appropriate;[1] and that, commencing on or about March 27, 1980, and at all times thereafter, Respondent has refused, and continues to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 18, 1980, the Respondent filed its answer to the complaint, and on May 14, 1980, an amended answer.

Thereafter, on April 30, 1980, Respondent and the Union filed jointly with the Regional Director for Region 27 a Stipulation for an Entry of Order wherein the Respondent asserted that the Board erred in directing an election among the unit of employees herein involved. The parties agreed that a decision and order on the complaint should issue to enable the Respondent to seek review of the Board's unit determination by the United States Court of Appeals for the Tenth Circuit, that an order be entered directing the Respondent to bargain with the Union as the exclusive bargaining representative of registered nurses employed by Respondent and without the necessity for any further procedural action.

On May 22, 1980, the General Counsel filed with the Board a Motion for Issuance of Decision and Order moving that the Board transfer the proceeding to itself and issue a Decision and Order finding that the Respondent has violated the Act as alleged.

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[1] Official notice is taken of the record in the representation proceeding, Case 27-RC-5911, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electro-Systems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F. 2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F. 2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F. 2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relation Board has delegated its authority in this proceeding to a three-member panel.

The Board hereby approves the Stipulation, grants the General Counsel's motion, and the proceeding is hereby transferred to and continued before the Board in Washington, D.C., for the making of findings of fact, conclusions of law, and the issuance of a decision and order.

Upon the basis of the Stipulation and the entire record in the case, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is now, and at all times material herein has been, a non-profit corporation duly organized under and existing by virtue of the laws of the State of Colorado, and maintains its principal office and place of business at Denver, Colorado, where it is engaged in the operation of an acute care hospital facility and geriatric facility.

Respondent, in the course and conduct of its business operations annually has a gross volume of revenue in excess of $500,000, and purchases and receives goods and materials valued in excess of $50,000, directly from points and places outside the State of Colorado.

Respondent admitted, and we find, that it is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Respondent admitted, and we find, that Beth Israel Federation of Nurses and Health Professionals, FNHP/AFT, CFT, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

Since on or about March 21, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the appropriate unit: All full-time and regular part-time registered nurses employed by the Respondent in its hospital and geriatric center, but excluding all other employees, guards and supervisors as defined in the Act. Commencing on or about March 21, 1980, and at all times thereafter, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive collective-bargaining representative of all employees in the appropriate unit.

In their joint motion, all parties stipulated that the Union was certified as the bargaining representative for an appropriate unit of registered nurses pursuant to a Board-conducted election on January 16, 1980. Since the submission of the joint motion herein, the Board has had occasion in its recent decision in *Newton-Wellesley Hospital*, 250 NLRB No. 86, to reexamine at some length the appropriateness of a unit of registered nurses and to consider contentions that the Board had been finding registered nurses units appropriate *per se* without evaluating counterveiling evidence concerning the relationship between registered nurses and other professional employees. After a thorough examination of all of the evidence in *Newton-Wellesley*, we concluded that the registered nurses there comprised a separate appro-

priate unit. Here, while the Regional Director issued his decision in the underlying representation case without the benefit of *Newton-Wellesley*, he received and considered all of the evidence presented by Respondent as to the appropriateness of the petitioned-for unit and examined all of the Board's community of interest factors in detail. Upon doing so, the Regional Director concluded that the requested unit of registered nurses here was an appropriate unit for collective bargaining. Having examined this conclusion in light of *Newton-Wellesley*, we reaffirm the Regional Director's decision.

In view of the foregoing, we find that Respondent has, since March 21, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III above, occurring in connection with its operations described in section I above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive repre-

sentative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

Upon the basis of the foregoing findings of fact and the entire record the Board makes the following:

Conclusions of Law

1. Both Israel Hospital and Geriatric Center is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Beth Israel Federation of Nurses and Health Professionals, FNHP/AFT, CFT, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time registered nurses employed by the Respondent in its hospital and geriatric center, but excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 25, 1980, the above-named labor organization has been and is now the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 21, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in

the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Beth Israel Hospital and Geriatric Center, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with respect to rates of pay, wages, hours of employment and other terms and conditions of employment with Beth Israel Federation of Nurses and Health Professionals, FNHP/AFT, CFT, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time registered nurses employed by the Respondent in its hospital and geriatric center, but excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the National Labor Relations Board finds will effectuate the policies of the National Labor Relations Act, as amended:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all

employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached embody such understanding in a signed agreement.

(b) Post at its Denver, Colorado, place of business copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C., August 26, 1980.

/s/ JOHN H. FANNING
Chairman

/s/ HOWARD JENKINS, JR.
Member

/s/ JOHN C. TRUESALE,
Member

NATIONAL LABOR RELATIONS BOARD

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[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours of employment, and other terms and conditions of employment with Beth Israel Federation of Nurses and Health Professionals, FNHP/-AFT, CFT, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time registered nurses employed by the Employer in its hospital and geriatric center, but excluding all other employees, guards and supervisors as defined in the Act.

BETH ISRAEL HOSPITAL AND GERIATRIC CENTER
(Employer)

Dated _____

By _____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 260, U.S. Custom House, 720 - 19th Street, Denver, Colorado 80202. Telephone 303-837-3553.

IN THE
UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

Case No. 27-CA-6658

BETH ISRAEL HOSPITAL, GERIATRIC CENTER
And
BETH ISRAEL FEDERATION OF NURSES AND HEALTH PROFESSIONALS, AFL/CIO.

STIPULATION FOR AN ENTRY OF ORDER

1. BETH ISRAEL FEDERATION OF NURSES AND HEALTH PROFESSIONALS, FNHP/AFT, CFT, AFL/CIO, hereinafter referred to as the "Union," and BETH ISRAEL HOSPITAL AND GERIATRIC CENTER, hereinafter referred to as the "Employer," are parties to a representation matter before the National Labor Relations Board in Case No. 27-RC-5911.

2. A hearing in Case No. 27-RC-5911 was held before a hearing officer of the National Labor Relations Board on November 1, 2, 5, and 6, 1979, in Denver, Colorado. The Union and the Employer had full opportunity to introduce any and all evidence that either party desired. Subject to any objections which any party may have made during the course of the hearing, the Union and the Employer agree that the record in Case No. 27-RC-5911 is complete on the issue of the appropriateness of the bargaining unit. On December 17, 1979, the Regional Director issued his decision and direction of election. The Regional Director rejected the position of the Employer that the appropriate unit should be all

professional employees employed by the Employer and directed an election among only registered nurses. The registered nurse unit at the Employer's facility was the unit sought by the Union. The decision excluded professional employees, other than registered nurses, at the Employer's facility. The Employer filed a timely request for review. The request for review was denied by the National Labor Relations Board on January 15, 1980.

3. An election was held on January 16, 1980, in which the Union received a majority of the valid votes cast.

4. On January 25, 1980, the National Labor Relations Board certified the Union as the exclusive bargaining representative of the registered nurses at the Employer's facility.

5. On March 21, 1980, the Union made a written request for bargaining.

6. On March 26, 1980, the Employer made a written refusal of that request.

7. The Union filed an unfair labor practice charge with the regional office of the National Labor Relations Board.

8. In order to expedite the appeal of this matter, the parties have entered into this Stipulation for the Entry of an Order by the National Labor Relations Board finding the Employer has committed a technical refusal to bargain. The parties have further agreed that upon entry of the Order by the National Labor Relations Board, the Employer will immediately file an appeal in the United States Court of Appeals for the Tenth Circuit. By this procedure, the parties will significantly expedite the resolution of the bargaining unit issue. The parties have

agreed that the procedure outlined above, if approved by the Board, would be the procedure that the parties will follow to resolve the Employer's refusal to bargain that is alleged in Case No. 27-CA-6658.

9. The Employer's refusal to bargain is for the sole purpose of having the United States Court of Appeals for the Tenth Circuit determine the following issue: whether the National Labor Relations Board erred in directing an election among registered nurses only, rather than also including other professional employees.

10. The Employer, by entering into this Stipulation, reserves all legal rights that it has to appeal the issues set forth in Paragraph 9 to the United States Court of Appeals for the Tenth Circuit, and to the United States Supreme Court, for determination. The only right that is waived by the Employer is the right to any further consideration of these issues by the National Labor Relations Board. It is agreed that this case shall be in the same posture before the United States Court of Appeals for the Tenth Circuit as it would have been if the standard procedures had been followed, i.e., after a complaint had issued, the Employer would have filed an answer defending the allegations on the grounds that the bargaining unit is inappropriate, the Union would have moved for summary judgment, the Employer would have responded to the motion again asserting the bargaining unit defense, the National Labor Relations Board would have granted the motion for summary judgment, and the Employer would have then appealed to the United States Court of Appeals for the Tenth Circuit.

11. The Union, by entering into this Stipulation, reserves all of other legal rights it has with regard to the organizational effort of the employees, including the

right to file and pursue unfair labor practice charges not directly related to Paragraph 9 of this Stipulation.

WHEREFORE, the parties do jointly request that the National Labor Relations Board enter an Order finding a technical refusal to bargain and directing the Employer to bargain with the Union as the exclusive bargaining representative of registered nurses employed at Beth Israel Hospital and Geriatric Center. The parties request this Order be entered without the necessity of any further procedural action and that it be entered as soon as possible.

BETH ISRAEL HOSPITAL AND
GERIATRICS CENTER

By /s/ John D. Coombe
Attorney

By /s/ John M. Husband
Attorney

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BETH ISRAEL FEDERATION
OF NURSES AND HEALTH
PROFESSIONALS, FNHF/
AFT, CFT, AFL-CIO

By /s/ Lawrence A. Poltrock
Attorney

/s/ Michael Radzilowsky
Attorney

DEJONG, POLTROCK AND GIAMPIETRO
134 North LaSalle Street
Chicago, Illinois 60626

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BETH ISRAEL HOSPITAL AND GERIATRIC CENTER, 1/	Employer,
and	
BETH ISRAEL FEDERATION OF NURSES AND HEALTH PROFESSIONALS, AFT/FNHT, CFT, AFL-CIO,	Petitioner,
and	
UNITED NURSES, PROFESSIONALS AND HEALTH CARE EMPLOYEES, LOCAL SEVEN - UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO,	Intervenor, 2/
and	
COLORADO NURSES' ASSOCIATION, AFFILIATE OF THE AMERICAN NURSES' ASSOCIATION,	Intervenor. 2/

DECISION AND DIRECTION OF ELECTION

Case No. 27-RC-5911

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.[3]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective

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[1] See page 71a, *infra*.

[2] See page 71a, *infra*.

[3] See page 71a, *infra*.

bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses employed by the Employer in its hospital and geriatric center,[4] but excluding all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately before the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by BETH ISRAEL FEDERATION OF NURSES AND HEALTH PROFESSIONALS, AFT/FNHT, CFT, AFL-CIO, *or* UNITED NURSES, PROFESSIONALS AND HEALTH CARE EMPLOYEES, LOCAL SEVEN—UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO, *or* COLORADO NURSES'

[4] See pages 71a-73a, *infra*.

ASSOCIATION, AFFILIATE OF THE AMERICAN NURSES' ASSOCIATION.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 6 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge, Subregion, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the 27th Regional Office, 260 New Custom House, 721—19th Street, Denver, Colorado 80202 on or before December 26, 1979. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570. This request must be received by the Board in Washingtion by December 31, 1979.

Dated December 17, 1979
at Denver, Colorado

/s/ W. BRUCE GILLIS, JR.
Regional Director, Region 27

(SEAL)

FOOTNOTES

[1] The name of the Employer appears as corrected at the hearing.

[2] On November 1, 1979, the Intervenors were permitted to intervene pursuant to motions made at the hearing.

[3] The Employer declined to stipulate that the Petitioner and the two Intervenors are labor organizations. However, the evidence of record indicates that each of these organizations has employee participation and exists for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms and conditions of employment on behalf of the employees they represent. Accordingly, I find that the Petitioner and each of the Intervenors are labor organizations within the meaning of Section 2(5) of the Act.

[4] The Petitioner and the Intervenors seek a unit composed of all full-time and regular part-time registered nurses employed by the Employer, but excluding all other employees, guards and supervisors within the meaning of the Act. The Employer contends that the unit should be an all-professional unit including all registered nurses and all professional employees employed in physical therapy, medical technology, pharmacy, radiology, occupational therapy, respiratory therapy, and diabetic departments. The Employer would exclude employees classified as medical librarian, medical records administrator (librarian), geriatric activities director, social worker, education director, and planning assistant/grant writer, even though it would appear from the record that some, if not all, of these employees, are professional employees within the meaning of Section 2(12) of the Act. The Employer would also exclude non-supervisory medical doctors. The parties stipulated that registered nurses, pharmacists, physical therapists, and registered clinical dieticians are professional employees, but did not so stipulate in regard to the other employees which the Employer would include in the unit. In view of my unit finding herein, I need not make a finding regarding the professional status of the disputed employees.

The Employer is a non-profit, licensed corporation engaged in providing acute patient care and geriatric patient care in Denver, Colorado. Under the direction and supervision of a Board of Directors, an administrator, an associate administrator, three assistant administrators, some administrative clinical persons, and various departmental supervisors, it operates a combined 300-bed acute care hospital and a 140-

bed long-term geriatric facility. It employs approximately 682 employees, of which approximately 132 are RN's.

The main area of dispute is whether the unit should be restricted to registered nurses as the petitioner and Intervenors ask, or whether the unit should be an all-professional unit as the Employer argues. The Board has consistently held that a unit restricted to registered nurses is a presumptively appropriate one. *Mercy Hospitals of Sacramento*, 217 NLRB 765, *Allegheny General Hospital*, 239 NLRB No. 104. The Ninth Circuit Court of Appeals in *N.L.R.B. v. St. Francis Hospital of Lynwood*, 601 F. 2d 404, has held that this presumption cannot be an *irrebutable* one. The record discloses that the presumption that registered nurses at Beth Israel constitute an appropriate unit has *not been overcome* by the Employer's evidence. The Employer's attempts to distinguish the facts of this case from *Mercy Hospital, supra*, are not persuasive. All RN's at Beth Israel are employed in Nursing Services under the direction and supervision of the Director of Nursing Services. While they are recruited by the personnel department, they are interviewed and selected by the appropriate supervisor in nursing services. The registered nurses must possess certain educational requirements and pass a uniform national examination, and must be licensed by the State of Colorado. Their duties and responsibilities cannot be delegated to other hospital employees. The director of nursing at Beth Israel has significant control over the working conditions and hiring and firing of the registered nurses. Unlike the vast majority of other employees, the registered nurses are scheduled 24 hours a day, 7 days a week. The contacts that the registered nurses have with the other professional employees is of a limited and routine nature. The contacts had by registered nurses with other registered nurses is substantially greater. Although, because of specialization, the nursing personnel cannot operate in each and every unit of the hospital, there are related units in which nurses do substitute. Beth Israel conducts a number of in-service educational classes directed only at nursing personnel. Registered nurses are the only professional employees that each and every patient would be in contact with during their hospital stay. They utilize extensive manuals with regard to their own operating procedures that are not shared with other professional employees. The above facts establish the "singularity" of interests shared by the registered nurses, and I, therefore, find that the requested unit of registered nurses at Beth Israel is an appropriate one. *Mercy Hospitals of Sacramento, supra, Allegheny General Hospital, supra.*

The parties stipulated, and based on the evidence of record, I find, that James E. Creighton, director of nursing services; Gloria Flink, associate director of nursing services; Somi Ostomasthien and Betty Fallon, evening shift supervisor and relief supervisor, respectively; Marjorie Sanden and Agnes Tomer, night shift supervisors; Midge Burrows, critical care supervisor; Margaret Bridge, emergency department supervisor; Eleanor Crichton, director of nursing for the "Old Folk's Home;" Becky Rudiger, supervisor of the surgical department and recovery room; and Elizabeth Fallon, RN supervisor, are supervisors within the meaning of the Act, and I shall exclude them from the unit. The Petitioner would include Betty Scheuwater and Rose Tronnier, the two IV nurses on the day shift, while the Employer contends that they are supervisors and should be excluded. The evidence of record indicates that in addition to their IV duties, they fill in for the director of nursing and the associate director of nursing about 50% of the time, but the record does not otherwise indicate what supervisory duties they might perform. Accordingly, I find that the evidence of record is insufficient to determine whether or not they are supervisors and I shall permit them to vote subject to challenge.

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

BETH ISRAEL HOSPITAL AND GERIATRIC CENTER,

Employer,

and

BETH ISRAEL FEDERATION OF NURSES AND HEALTH PROFESSIONALS, AFT/FNHP, CFT, AFL-CIO, Petitioner.

and

COLORADO NURSES' ASSOCIATION, AFFILIATE OF THE AMERICAN NURSES' ASSOCIATION, Intervenor.

Case No. 27-RC-5911 | Date Filed 8/31/79

Date Issued January 16, 1980

Type of Election: (Check one:)
- ☐ Stipulation
- ☐ Board Direction
- ☐ Consent Agreement
- ☒ RD Direction

Incumbent Union (Code)

(If applicable check either or both:)
- ☐ 8(b) (7)
- ☐ Mail Ballot

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters	122
2. Void ballots	0
3. Votes cast for PETITIONER	81
4. Votes cast for INTERVENOR	6
[illegible]	
6. Votes cast against participating labor organization(s)	23
7. Valid votes counted (sum of 3, 4, ~~5~~ and 6)	110
8. Challenged ballots	5
9. Valid votes counted plus challenged ballots (sum of 7 and 8)	115

10. Challenges are (not) sufficient in number to affect the results of the election.

11. A majority of the valid votes counted plus challenged ballots (item 9) has ~~not~~ been cast for: BETH ISRAEL FEDERATION OF NURSES AND HEALTH PROFESSIONALS, AFT/FNHP CFT, AFL-CIO

For the Regional Director

Kathleen J. Mayer

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER
Valerie D. Cooney Attorney

For PETITIONER
[illegible] RN

For INTERVENOR
Alice Romaine RN

For

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979—311-250

NLRB

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

BETH ISRAEL HOSPITAL AND GERIATRIC CENTER,

Employer,

and

BETH ISREAL FEDERATION OF NURSES AND HEALTH PROFESSIONALS, AFT/FNHT, CFT, AFL-CIO,

Petitoner,

and

COLORADO NURSES' ASSOCIATION, AFFILIATE OF THE AMERICAN NURSES' ASSOCIATION,

Intervenor.

TYPE OF ELECTION

(Check one)

- ☐ Consent Agreement
- ☐ Stipulation
- ☐ Board Direction
- ☒ RD Direction

(Also check box below where appropriate)

- ☐ 8(b)(7)

Case No. 27-RC-5911

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for

BETH ISRAEL FEDERATION OF NURSES AND HEALTH PROFESSIONALS, AFL/FNHT, CFT, AFL-CIO

and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

UNIT: INCLUDED: All full-time and regular part-time registered nurses employed by the Employer in its hospital and geriatric center

EXCLUDED: All other employees, guards and supervisors as defined in the Act.

Signed at Denver, Colorado
On the 25th day of January 19 80

On behalf of
NATIONAL LABOR RELATIONS BOARD

W. Duane Gilbert Jr.

Regional Director, Region 27
National Labor Relations Board

APPENDIX F

FJP

252 NLRB No. 12 D—6723

Denver, CO

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 27-CA-6723

ST. ANTHONY HOSPITAL SYSTEMS

and

ST. ANTHONY FEDERATION OF NURSES AND HEALTH PROFESSIONALS AFT/FNHP, CFT, AFL-CIO

DECISION AND ORDER

Upon a charge filed on May 13, 1980, by St. Anthony Federation of Nurses and Health Professionals AFT/FNHP, CFT, AFL-CIO, herein called the Union, and duly served on St. Anthony Hospital Systems, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 27, issued a complaint and notice of hearing on June 6, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on January 31, 1980, following a Board election in Case 27-RC-5914, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about May 9, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On June 12, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Respondent admits that it meets the Board's jurisdictional standards, but denies that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act. Respondent denies that the Union is a labor organization within the meaning of Section 2(5) of the Act, and denies that the following is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time registered nurses employed by Respondent at its St. Anthony Central and St. Anthony North facilities, but ex-

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[1] Official notice is taken of the record in the representation proceeding, Case 27-RC-5914, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRB, as amended.

cluding the director of nursing services, associate director of nursing services, director of patient care services for the North facility, shift operation managers, nursing services supervisors and all other employees, guards and supervisors as defined by the Act.

Respondent also denies that the Union has been, at all times since January 23, 1980, and is now, the exclusive representative of all employees in the unit described above, but admits that on January 31, 1980, the Regional Director for Region 27 certified the Union as the exclusive collective-bargaining representative of all employees in said unit. Respondent admits the allegation that it refused, and continues to refuse, to meet and bargain with the Union as the collective-bargaining representative, but denies the conclusory 8(a)(5) and (1) allegations. It alleges that it is not an employer covered by the National Labor Relations Act in that it is an exempt religious organization not covered by the terms of the Act, and further that the Act cannot under the first amendment constitutionally reach Respondent.

On July 2, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on July 9, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its response to the motion and its answer to the complaint, Respondent attacks the Union's certification on the grounds that the Union is not a labor organization within the meaning of the Act, that the unit is inappropriate and results in an undue proliferation of bargaining units, and that the Board lacks jurisdiction over Respondent.

Review of the record herein reveals that in Case 27-RC-5914 the petition was filed by the Union on September 4, 1979, and an amended petition was filed on September 25, 1979. On December 17, 1979, the Regional Director issued his Decision and Direction of Election in which he found, *inter alia*, that the Union was a labor organization within the meaning of Section 2(5) of the Act, and that the petitioned-for unit was an appropriate unit for collective bargaining. With regard to Respondent's contention that the unit was inappropriate, the Regional Director noted that the Board had held that a unit restricted to registered nurses was a presumptively appropriate one, citing *Mercy Hospitals of Sacramento, Inc.*, 217 NLRB 765 (1975). However, the Regional Director further noted that in *N.L.R.B. v. St. Francis Hospital of Lynwood, a Corporation*, 601 F.2d 404 (9th Cir. 1979), the court held that any such presumption could not be irrebuttable. Accordingly, the Regional Director received, and considered, evidence presented by Respondent as to the appropriateness of the petitioned-for unit. While recognizing that a degree of broad commonality would favor a larger unit of all professional employees, the Regional Director found a lack of functional interchange of responsibility or duties between registered nurses and other professional employees, found that registered nurses must comply with separate educational and licensing requirements,

and found that contacts between registered nurses and other professional employees were limited and of a routine nature. After considering Respondent's asserted evidence as to the unit scope issue, the Regional Director concluded that the requested unit of registered nurses was an appropriate unit for collective bargaining. On or about January 2, 1980, Respondent filed a request for review of the Regional Director's Decision and Direction of Election, which was denied by the Board on January 22, 1980, as it raised no substantial issues warranting review.[2] The election was held on January 23, 1980. At the conclusion of the balloting, the tally revealed that 310 votes had been cast for the Union, 15 votes had been cast for the Intervenor,[3] and 172 votes had been cast against the participating labor organizations. There were 35 challenged ballots, an insufficient number to affect the results. On January 31, 1980, the Regional Director certified the Union as the exclusive collective-bargaining representative of the employees in the unit found appropriate.

Following a request by the Union on or about April 2, 1980, that Respondent engage in collective-bargaining negotiations with the Union, Respondent, by letter dated May 9, 1980, refused to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the certified unit.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special

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[2] We reaffirm the Regional Director's finding that, based upon the evidence adduced in Case 27-RC-5914, the petitioned-for unit is appropriate. See *Newton-Wellesley Hospital*, 250 NLRB No. 86 (1980).

[3] Colorado Nurses Association, Affiliate of the American Nurses Association.

circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding,[5] and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is a Colorado corporation engaged in the operation of an acute care hospital system, including two facilities in the Denver, Colorado, metropolitan area. In the course of its business operations within the State of

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[4] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[5] In its response to the motion and its answer to the complaint, Respondent also argues, for the first time, that the Board lacks jurisdiction over its operations. We find this assertion without merit. *Bon Secours Hospital, Inc.*, 248 NLRB No. 19 (1980); *Mid American Health Services, Inc.*, 247 NLRB No. 109 (1980).

Colorado, Respondent annually purchases and receives goods and materials valued in excess of $50,000 directly from sources located outside the State of Colorado, and annually derives gross revenues in excess of $500,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

St. Anthony Federation of Nurses and Health Professionals AFT/FNHP, CFT, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time registered nurses employed by Respondent at its St. Anthony Central and St. Anthony North facilities, but excluding the director of nursing services, associate director of nursing services, director of patient care services for the North facility, shift operation managers, nursing services supervisors and all other employees, guards and supervisors as defined by the Act.

2. The certification

On January 23, 1980, a majority of the employees of Respondend in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 27, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on January 31, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 2, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about May 9, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since May 9, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed statement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. St. Anthony Hospital Systems is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. St. Anthony Federation of Nurses and Health Professionals AFT/FNHP, CFT, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time registered nurses employed by Respondent at its St. Anthony Central and St. Anthony North facilities, but excluding the director of nursing services, associate director of nursing services, director of patient care services for the North facility, shift operation managers, nursing services supervisors, and all other employees, guards, and supervisors as defined by the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 31, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about May 9, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in

the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, St. Anthony Hospital Systems, Denver, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with St. Anthony Federation of Nurses and Health Professionals AFT/FNHP, CFT, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time registered nurses employed by the Respondent at its St. Anthony Central and St. Anthony North facilities, but excluding the director of nursing services, associate director of nursing services, director of patient care services for the North facility, shift operation managers, nursing services supervisors and all other employees, guards and supervisors as defined by the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Denver, Colorado, places of business copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. September 9, 1980.

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with St. Anthony Federation of Nurses and Health Professionals AFT/FNHP, CFT, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time registered nurses employed by us at our St. Anthony Central and St. Anthony North facilities, but excluding the director of nursing services, associate director of nursing services, director of patient care services for the North facility, shift operation managers, nursing services supervisors and all other employees, guards and supervisors as defined by the Act.

ST. ANTHONY HOSPITAL SYSTEMS
(Employer)

Dated _____

By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Custom House, Room 260, 721 19th Street, Denver, Colorado 80202, Telephone 303-837-3553.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. ANTHONY HOSPITAL SYSTEMS, Employer — Case No. 27-RC-5914

and

ST. ANTHONY FEDERATION OF NURSES AND HEALTH PROFESSIONALS AFT/FNHP/,CFT, AFL-CIO, Petitioner

and

UNITED NURSES, PROFESSIONALS AND HEALTH CARE EMPLOYEES, LOCAL SEVEN - UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO Intervenor

and

COLORADO NURSES ASSOCIATION, AFFILIATE OF THE AMERICAN NURSES ASSOCIATION, Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization(s) involved claim to represent certain employees of the Employer.[1]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.[2]

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective

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[1] See page 94a, *infra*.

[2] See pages 94a-95a, *infra*.

bargaining within the meaning of Section 9(b) of the Act:[3]

All full-time and regular part-time registered nurses,[4] employed by the Employer at its St. Anthony Central and St. Anthony North facilities; excluding the director of nursing services, associate director of nursing services, director of patient care services for the North facility, shift operation managers, nursing services supervisors and all other employees, guards and supervisors[5] as defined by the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately before the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employes who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently

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[3] See pages 95a-98a, *infra*.

[4] See pages 98a-102a, *infra*.

[5] See pages 102a-104a, *infra*.

replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the St. Anthony Federation of Nurses and Health Professionals/AFT/FNP/, CFT, AFL-CIO—Petitioner or United Nurses, Professionals and Health Care Employees, Local Seven—United Food and Commercial Workers, AFL-CIO—Intervenor, or Colorado Nurses Association, Affiliate of the American Nurses Association—Intervenor.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statuory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 6 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge, Subregion, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office of the National Labor Relations Board, 27th Region, 260 New Custom House, 721 19th Street, Denver, Colorado on or before December 24, 1979. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717

Pennsylvania Avenue, NW., Washington, D.C. 20570. This request must be received by the Board in Washingtion by December 31, 1979.

Dated December 17, 1979
at Denver, Colorado

/s/ W. BRUCE GILLIS, JR.
Regional Director, Region 27

(SEAL)

FOOTNOTES

[1] At the hearing the Employer refused to stipulate that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. Record evidence reveals that the Petitioner is an organization in which employees participate and that it exists for the purpose, at least in part, to deal with employers concerning wages, hours, and other terms and conditions of employment. Accordingly, I find the Petitioner to be a labor organization within the meaning of Section 2(5) of the Act. *Alto Manufacturing Corporation*, 136 NLRB 850. In addition, because of record testimony that the Petitioner's membership is limited to registered nurses, the Employer in its post-hearing brief asserts that if a more inclusive unit is found to be appropriate, the Petition must be dismissed because the Petitioner is not qualified to represent any employee classification other than registered nurses. The Board has held that the willingness of a Petitioner to represent employees rather than the eligibility of employees to membership in the Petitioner is controlling under the Act, *"M" System, Inc., Mobile Home Division, Mid-States Corp.*, 115 NLRB 1316 at footnote 2. However, I find it unnecessary to make a determination regarding the Employer's assertion in view of my findings concerning the appropriate unit.

[2] The Employer is an acute care hospital system with two facilities in the Denver metropolitan area and one facility, the Summit Clinic, at Frisco, Colorado which is approximately seventy miles from Denver. The two facilities in Denver, St. Anthony Central and St. Anthony North, are approximately ten miles apart. Along with its operations as an acute care hospital the Employer operates a "flight for life" program and neurotrauma unit. Basically, the flight for life program is engaged in the transport and in-flight care of critical patients from outlying areas to the Employer's two facilities in Denver or other hospitals in the area. The Neurotrauma unit is a specialized ward engaged in the care of patients with brain and spinal cord injuries. There is record evidence which indicates the Employer utilized a "trauma team." However, the record is unclear with regard to its function or whether it is only another name for the neurotrauma unit.

There are approximately 1800 employees at St. Anthony Central, 350 employees at St. Anthony North, and 20 employees at the Summit Clinic. The Employer's total employee compliment includes approximately 450 registered nurses. Record evidence establishes that the Summit Clinic, unlike the Central and North facilities, is not an in-patient care facility. The Employer's organizational structure consists of a

president with an executive vice-president and two assistant executive directors reporting directly to him. There are also various administrative coordinators, a chief of medical staff and the St. Anthony Central director, Sister Antonette, who report directly to the president. The executive vice-president is responsible for all three of the Employer's facilities. Various administrative coordinators, apparently on a lower level than those administrative coordinators who report to the president, and directors report to the executive vice-president. One of these is the director of the Summit Clinic. One of the assistant executive directors, Douglas Cook, has overall responsibility for the St. Anthony North facility. In addition, various department directors report to him. The record does not indicate the extent of these directors' responsibilities with regard to the Employer's three facilities. The second assistant executive director is responsible for financial and budgetary aspects of the system.

Barbara Lockwood, the director of nursing services, also reports directly to the executive vice-president. The director of patient care services for the North facility reports to Lockwood as does the supervisor of the flight for life operation.

[3] The Employer's position is that the unit scope should include employees at the Employer's three facility systems while the Petitioner and Intervenors contend employees at the Summit Clinic should not be included. The Employer in its post-hearing brief asserts its agreement with the Petitioner and Intervenors that any unit found appropriate must include at minimum, employees employed at the Central and North facilities.

There is record testimony to show centralization of personnel functions for all three facilities and common policy regarding benefits and other terms and working conditions. In addition, the director of the Summit Clinic attends finance and budget committee meetings and administrative council meetings wherein policy decisions are made for the system. While the record indicates that the Central facility is a locus for hiring personnel, it is possible that a person applying for employment at the Summit Clinic may be hired directly by the director of that facility. In addition, the record reveals that the director of nursing services is responsible for the Central and North facilities but has no responsibility for the Summit Clinic. With regard to employee interchange, there is record testimony to show that employees transfer permanently and temporarily between the Central and North facilities. The one witness called to testify about employee transfers could not recall any transfers between the two Denver facilities and the Summit Clinic except for one employee in the X-

ray department at Central who transferred to the Summit Clinic. There is no record evidence to indicate any degree of contact or common immediate supervision between employees at the Summit Clinic and employees at the Central and North facilities. There is no indication of functional integration between nurses at the Summit Clinic and those at the Central and North facilities. As noted *supra* the Summit Clinic is geographically separated from the Central and North facilities by approximately 70 miles. Lastly, there is no record evidence to establish a history of collective bargaining in a unit of employees whose scope encompasses the Employer's three facilities.

While the Employer has introduced evidence which tends to support a system-wide unit, the record as a whole does not establish that a unit of that scope is the only appropriate unit. After careful consideration of all the relevant factors I find there is insufficient record evidence of criteria traditionally held by the Board to be relevant to a multilocation unit such that the Summit Clinic employees must be included in the appropriate unit. In this regard I note that the Board does not require the finding of the only appropriate unit but that of an appropriate unit. In view of all the above, I find appropriate a unit of those employees employed by the Employer at its Central and North facilities.

As amended at the hearing, the Petitioner seeks to represent all registered nurses employed by the Employer at its Central and North hospital facilities in Denver, Colorado, including staff nurses, infection control nurses, in-service education nurses (medical education nurse), emergency medical services nurses, pre-admission nurses, cardio-pulmonary lab nurses, patient representative nurses, IV nurses, oncology nurses, float pool nurses, flight nurses, Colorado assessment nurses, cardio-vascular nurses, nurse anesthetist and staff nurse I; excluding systems director of patient care, service administrator, coordinator of patient care service (FAC), assistant director of patient care nurse (FAN), department managers, supervisor health service nurses, opthalmology nurse and all other employees and guards. The Intervenors are in accord with the Petitioner's position. The Employer is of the position that the appropriate unit include all full-time and regularly scheduled part-time professional employees; excluding all other employees, contract services employees, *Pro Re Nata* (PRN) pool employees who are per diem nurses, administrative employees, guards and supervisors within the meaning of Section 2(11) of the Act. In general, the Employer argues that only a unit of its professional employees is appropriate in these circumstances. The Board has consistently held that a unit restricted to registered nurses is a pre-

sumptively appropriate one. *Mercy Hospitals of Sacramento*, 217 NLRB 765, *Allegheny General Hospital*, 239 NLRB No. 104. The Ninth Circuit Court of Appeals in *N.L.R.B. v. St. Francis Hospital of Lynwood*, 601 F. 2d 404, has held that this presumption cannot be an irrebutable one. The record, as a whole, discloses that the presumption, that registered nurses in this matter constitute an appropriate unit, has not been overcome by the Employer's evidence.

In support of its position, the Employer in its post-hearing brief, asserts that the administrative centralization in its system, the amount of daily interaction between registered nurses and other health care professionals, common immediate supervision for all professional employees, similarities in wages, hours, and other terms and conditions of employment for all professionals, a lack of a history of collective bargaining for registered nurses in Colorado, and the commonality of professionalism are all factors which mandate finding that the appropriate unit must include all professional employees.

While record evidence discloses administrative centralization and similarity in hours and other terms and conditions of employment in many instances for all professional employees, there is no evidence to indicate those factors do not also apply to the Employer's non-professional employees as well. The Board has held this broad commonality cannot, and does not, in and of itself, fashion an appropriate overall unit, *St. Francis Hospital Medical Center*, 223 NLRB 1451 and cases cited at footnote 6. As to the amount of interaction among registered nurses and other health care professionals, record evidence indicates that registered nurses interact with non-professional employees as well as other professional employees. In one circumstance registered nurses share some duties in caring for psychiatric patients. The record discloses that there are nine registered nurses, eight mental health workers, two ward clerks, and one occupational therapist employed in the psychiatric ward. This ward is administered by the Director of Nursing Services. The duties of registered nurses and mental health workers are general patient care for ward patients, managing violent patients, and assessing the mental condition of patients while in the emergency room or in the wards. However, only registered nurses may administer medicine. In those cases where psychiatric ward patients have serious medical problems, registered nurses will be assigned to their care. In addition, registered nurses assigned to the psychiatric ward "float" to medical or surgical nursing units. In sum, the record as a whole, reveals contact in varying degree among registered nurses and other employees, however, it does not reveal functional interchange of responsi-

bility or duties, except for registered nurses in the psychiatric ward, among registered nurses and other employees.

The Employer presumably requires individuals employed or registered nurses to comply with all required educational examination and licensing requirements. The contacts that the registered nurses have with the other professional employees is of a limited and routine nature. The contacts had by registered nurses with other registered nurses is substantially greater. Although, because of specialization, the nursing personnel cannot operate in each and every unit of the hospital, there are related units in which nurses do substitute. I note that in the State of Colorado there are very few hospitals which have collective bargaining agreements. Two Veterans hospitals in Colorado have agreements covering units restricted to registered nurses. A hospital in Glenwood Springs is unique in that the unit includes both registered nurses and non-professional employees.

Regarding this later case I have taken official notice of my decision in *Valley View Hospital Association* (27-RC-5808) which is the Glenwood Springs facility in question. I note that the registered nurses were included in that general, non-professional unit because the parties in that case stipulated that the RN's at that particular facility were *not* employed as professionals. The Board's decision in *Mercy Hospitals, supra*, relied on the exclusionary representation pattern of registered nurses across the country, both prior to and at the time of the debate surrounding the question of appropriateness of registered nurse units, patterns which the Board had, even prior to the health care amendments, acknowledged. No evidence was presented on the present record which tends to undermine these considerations. *Texas Institute for Rehabilitation*, 228 NLRB 578. The above facts establish the "singularity" of interests shared by the registered nurses, and I, therefore, find that the requested unit of the Employer's registered nurses is an appropriate one. *Mercy Hospitals of Sacramento, supra*; *Allegheny General Hospital, supra*. The sharing of certain duties by registered nurses with mental health workers in the psychiatric ward does not warrant a different conclusion.

[4] At the hearing the parties agreed that several of the Employer's job classifications, including registered nurses, fall within the Act's definition for professional employees. In addition, the Employer takes the position that several other job classifications are professional within the meaning of Section 2(12) of the Act. In view of my determination that a unit confined to registered nurses is appropriate, I find it unnecessary to determine the professional status of other job classifications.

The Employer would exclude while the Petitioner and Intervenor would include the health services nurse, the infection control nurse, the Colorado assessment nurse, in-service education nurse and the admissions nurse job classifications.

The Employer employs one health services nurse whose duties generally involve hospital employee health problems and administering physical examinations to employees. Her duties involve no patient care other than that of employees. She has an office at the Central facility separate from the nursing care area. Unlike registered nurses in nursing services, she works during the day only, five days a week and is a salaried employee. She is directly responsible to personnel administration officer. Because these factors suggest that the health services nurse has a minimal community of interest with other registered nurses, the record is insufficient to permit a determination concerning this classification. Accordingly, I shall allow her to vote subject to challenge.

The Employer employs one infection control nurse. The duties of this position entail surveillance of patients and employees who may be contagious; familiarizing new nursing employees with regard to isolation policy, proper technique and procedure: gathering statistical data which are used to formulate hospital policy with regard to isolation. As part of her duties she attends a city-wide organization of infection control coordinators during working hours. She is responsible for the Central and North facilities. She reports directly to the associate director of nursing services and also the chairman of the infection control committee, a physician. The position is salaried with no provision for overtime pay. The record further reveals that the infection control might occasionally volunteer to help on one of the nursing floors if the Employer is short handed. This, however, appears not to occur routinely. In view of the above, I find insufficient evidence with which to determine whether the infection control nurse should be included in the appropriate unit. Accordingly, I shall allow the infection control nurse to vote subject to challenge.

The record is unclear with respect to the in-service education nurse position, however, the Employer employs three registered nurses as instructors in emergency medical services who it appears may be in-service education nurses. Emergency medical services is a school or institute offered by the Employer to area policemen, firemen and emergency medical technologists employed by the Employer in its surgical and intensive care units. The three registered nurses report directly to the Education Director of Emergency medical services, also a registered nurse. The Director reports to a physician who is in charge of the school and also reports to the

director of nursing services. The record is unclear with regard to any other duties the registered nurses might have in addition to teaching in the school. One registered nurse is a field coordinator who spends approximately 80 per cent of the working time outside the hospital while the others spend approximately 15 per cent of their time out of the hospital. These registered nurses are salaried and do not wear uniforms. There is no record evidence to indicate the working hours of these nurses. In view of the above, I find there is insufficient evidence with which to determine whether the registered nurse instructors in the emergency medical service and/or in-service education nurses should be included in the unit. Accordingly, I shall allow them to vote subject to challenge.

As noted above, the parties are in disagreement with regard to the inclusion of the Colorado Assessment Nurse. The record contains no evidence with regard to this position. There is, however, record evidence concerning a nurse coordinator and data abstractor position employed in a utilization care review program. The requirements of the position are registered nurse with licensure and three to four years experience as a registered nurse working directly in patient care. Duties of the position are generally to review private contracts the Employer has with insurance companies, gathering abstracts from patients' medical records who are eligible for Medicare and Medicaid for information required by the Colorado Foundation for Medical Care and assure that patient length of stay follows guidelines established by the Colorado Foundation. The position is hourly paid at the same rate as other registered nurses. There is no evidence regarding hours of work. I find insufficient evidence to permit a determination regarding the nurse coordinator and data abstractor. Accordingly, I shall permit the employee in that position to vote subject to challenge.

While the Petitioner and Employer took positions with regard to an admissions nurse classification, I find no record evidence to permit a determination of that classification. Accordingly, I shall permit that employee to vote subject to challenge.

The record reveals that the Employer utilizes two nurse float pools within the department of nursing services. There are approximately 20 permanent float pool nurses who are full-time or regular part-time employees. The Employer is currently projecting for an increase of employees in the permanent float pool, however, the record is unclear as to the projected increase for registered nurses. In view of record evidence that registered nurses, in the permanent float pool, are full-time or regular part-time employees, they are included in

the bargaining unit. The Employer would exclude PRN float pool nurses, the second nurse float pool. The record reveals that the Employer employs three registered nurses in the PRN pool and is projecting for 150. PRN float pool nurses are utilized when the hospital patient census increases to the point where regular nursing unit employees and permanent regular and part-time float pool employees are unable to fulfill adequate staffing needs. PRN float pool nurses are not guaranteed any work time nor are they eligible for any benefits available to other employees. There is no record evidence with which to determine the amount of time that PRN float pool nurses have worked in the past, nor the extent they will be utilized in the future. Accordingly, I shall permit PRN float pool nurses to vote subject to challenge.

As stated above, the Petitioner would include patient representative nurses in the unit sought. The record reveals that four employees are employed as patient representatives, two of whom are registered nurses. The duties of the position are to act as liaison among the patient, his family, and the Employer. Minimum requirements for the position do not include qualification as a registered nurse, nor a college degree. The patient representatives who are registered nurses are not involved in direct patient care. Patient representatives report directly to the administator for patient relations. Patient representatives are hourly paid and are on duty for eight hour periods between 8:00 a.m. and 8:30 p.m. In view of the above, it appears that registered nurses employed as patient representatives share a minimal community of interest with other registered nurses, however, the record evidence is insufficient to permit a determination regarding this classification. Accordingly I shall allow registered nurse patient representatives to vote subject to challenge.

While the parties stated no position, the record also reveals that there are two perfusionists who are registered nurses, although registered nurse status is not a requirement of the position. The duties are to operate and maintain the heart and lung machines during surgery. The record indicates that the perfusionists report to a nursing supervisor. However, the record is unclear as to whether this is for any purpose other than during actual surgery operations. Perfusionists are salaried. The record does indicate hours of work. In view of the above, I am unable to determine whether registered nurses who are employed as perfusionists share a sufficient community of interest with other registered nurses. Accordingly, I shall allow them to vote subject to challenge.

The record further establishes that the Employer employs an artist/graphic illustrator, which position is currently filled by a registered nurse. She reports to the administrative

supervisor for the audio-visual department. Qualification for the position does not require status as a registered nurse. There is no record evidence to indicate the registered nurse in this position is involved in any way with the care of patients. In view of the above, I am unable to determine a sufficient community of interest with other registered nurses, accordingly, I will allow her to vote subject to challenge.

The record establishes that the Employer employs a planning associate. The position is currently filled by a registered nurse. Qualification for the position requires a masters degree in business or health administration. The registered nurse is working toward a masters degee in public administration. Duties include assisting in the formulation of a long-range master plan for the Employer, and insuring that the Employer is complying with all certificates of public necessity. The position is salaried. The planning associate reports directly to the director of health planning. In view of the above, I am unable to determine whether the registered nurse employed as planning associate shares a substantial community of interest with other registered nurses. Accordingly, I will allow her to vote subject to challenge.

[5] The Petitioner would include those registered nurses in the classification of staff nurse I, while the Employer would exclude this classification as supervisory within the meaning of the Act. There are approximately 50 registered nurses employed as staff nurse I. At the hearing numerous witnesses were called to testify on the status of this classification. The staff nurse I makes patient assignments to personnel, including registered nurses, LPN's, nurse aides and orderlies within a particular nursing unit. Their assignments are based on an evaluation by the staff nurse I of employee ability and the nature of the patient's illness or injury. The staff nurses I also have administrative duties whose extent appears to be largely a matter of individual discretion on the part of the various unit supervisors of staff nurses I, who are also registered nurses. Thus, the record reveals that some staff nurses I are involved in varying degrees of employee evaluation while others are not involved at all. There is record evidence that at least some unit supervisors make this decision based upon the tenure and experience of a staff nurse I. Where the staff nurse I is involved in employee evaluation, the record discloses no instance where an employee's evaluation, which would culminate in anything other than verbal censure, is not the ultimate responsibility of the unit supervisor. In addition, the record does not establish that the evaluation of employees by staff nurses I is a routine practice. In this regard several of the Employer's personnel forms were introduced into evidence at the hearing which only a unit supervisor has the

authority to sign. There is also evidence to show that staff nurses have been involved in the initial interviewing of prospective employees for a particular unit. However, these instances appear to be isolated and nowhere does the record show that employees have been hired based solely on the recommendation of the staff nurse I.

The record also indicates that the staff nurse I position is paid at a slightly higher rate than other registered nurses. However, the position is hourly paid as are other registered nurses, whereas unit supervisors are salaried. In addition, all hospital employees, with the exception of pharmacists, are subject to a 7 step pay scale. Thus, it is possible for a registered nurse with more seniority to be earning higher pay than a staff nurse I. The record further reveals that unit supervisors have overall 24 hour responsibility for their particular unit. There is no evidence to indicate the staff nurse I has responsibilities outside a particular shift. In this regard, all unit supervisors normally work the day shift only. In addition, the director of nurses at the North facility testified that staff nurses I spend 80 to 85 per cent of their time at the unit nurse station or on the ward with the remainder of the time conferring with the unit supervisor, doing in-services or running errands. Another witness, a staff nurse I at the Central facility, testified that 75 per cent of the problems solved by the staff nurse I for registered nurses and LPN's in the unit are patient care related. The remainder of the time is spent fielding personnel problems such as nurse complaints about schedules. However, there is no record evidence to indicate a staff nurse I has authority to change work schedules or assign overtime, other than to assure that minimum staffing requirements, as determined by hospital protocol, are met. A staff nurse I cannot compel an employee to come in when not scheduled or to work overtime. A staff nurse I cannot request an employee to work overtime or to report for duty when not scheduled, except where another employee is not reporting to duty. Additionally, staff nurses I do not attend supervisory meetings. In view of all the above and the record as a whole, I find that those registered nurses employed as staff nurse I do not possess sufficient indicia necessary to be supervisors within the meaning of the Act. Accordingly, they are included in the appropriate unit.

The parties have agreed that the following job classifications and persons are supervisors within the meaning of the Act: associate director of nursing services; director of patient care services for the North facility; shift operation managers; and education director of emergency medical services, Estelle Rador. In view of this agreement, which is supported by the

record, I shall exclude them from the appropriate unit. In addition, based on record evidence, I find that the director of nursing services and department of medical education program coordinators are supervisors within the meaning of the Act. Thus, they are excluded from the appropriate unit.

At the hearing the Petitioner was allowed to amend the petition, without objection from the Employer, to exclude the opthalmology nurse, apparently on the basis that the position is supervisory or managerial. The position is currently held by Alice McCoy, a registered nurse. She is responsible to the administrative coordinator for clinical services. Her duties include overall management of the opthalmology department and attendance at management meetings and interviewing prospective opthalmology employees. There is one other employee in the department, a certified opthalmic technician. In addition, the opthalmology nurse performs diagnostic eye tests and works in the operating room to assure the opthalmology equipment is present and available to physicians. There is not record evidence to indicate McCoy's hours of work, method of pay or the extent of time spent accomplishing her various duties. In view of the above, there is insufficient record evidence to permit determination regarding the status of opthalmology nurse. Accordingly, I shall allow the opthalmology nurse to vote subject to challenge.

APPENDIX G

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are as follows:

Section 1 * * *

* * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

Section 2(2)

The term "employer" includes any person acting as an agent of any employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof * * *.

* * * * *

Section 3(b)

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining,

to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence thereof. The Board shall have an official seal which shall be judicially noticed.

* * * * *

Section 7

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.

* * * * *

Section 8(a)

It shall be an unfair labor practice for an employer:

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Section 9(a)

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. * * *

* * * * *

Section 9(b)

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization ad-

mits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), * * *

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

Section 10(b)

Whenever it is charged that any person has engaged in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint . . . . The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give

testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

Respectfully submitted,

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Opposition

1

Office - Supreme Court, U.S.
FILED
DEC 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-876

In the Supreme Court of the United States

October Term, 1981

ST. LUKE'S FEDERATION OF NURSES
AND HEALTH PROFESSIONALS,
Petitioner,

vs.

PRESBYTERIAN/ST. LUKE'S MEDICAL CENTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Presbyterian/St. Luke's Medical Center, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 653 F.2d 450.

STATEMENT OF THE CASE

The respondent concurs with the petitioner's statement of the case except its statement that the sole issue presented to the court of appeals was whether the National Labor Relations Board ("Board") abused its discretion in certifying a unit composed only of registered nurses. (Pet., p. 6).

There were two questions presented to the court of appeals. The first was whether the Board erred in certifying a bargaining unit that included only employees at one of the respondent's three campuses. The second was whether the Board erred in certifying a bargaining unit that included only registered nurses, rather than including other professional employees. Neither issue concerned whether the Board abused its discretion, but rather whether it applied the correct legal standard in making its unit determination.

SUMMARY OF ARGUMENT

There are two reasons why the petition for writ of certiorari should be denied. First, there is no conflict among the courts of appeals that have reviewed the Board's bargaining unit determinations in the health care industry. The Tenth Circuit's decision in this case is in complete accord with decisions of the Second, Third, Seventh and Ninth Circuits, and no court of appeals that has been squarely presented with a substantially similar unit composition issue has decided that issue in a manner that conflicts with the decision in this case.

This case comes to the Court in the same posture that *N.L.R.B. v. Mercy Hospital Ass'n*, 606 F.2d 22 (2d

Cir. 1979), *cert. denied*, 445 U.S. 971 (1980), did when this Court denied the Board's petition for writ of certiorari in that case, and no case has since been decided that warrants a different disposition of this petition.

The second reason to deny the petition is that the Tenth Circuit remanded this case to the Board for further proceedings consistent with its opinion. Counsel for all parties were notified on October 22, 1981, that the Board had accepted the remand. Thus, the case is not ripe for review by this Court.[1]

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1. The petition in this case may also be premature due to petitions for rehearing that are presently pending in the Tenth Circuit. This case was the lead case in a series of three cases that the Tenth Circuit decided concerning bargaining unit determinations in the health care industry. In the other two cases, *Beth Israel Hospital and Geriatric Center v. N.L.R.B.*, ... F.2d ....., 107 LRRM 3214 (10th Cir. 1981), and *St. Anthony Hospital Systems v. N.L.R.B.*, 655 F.2d 1028 (10th Cir. 1981), the Board filed timely petitions for rehearing on that part of the Tenth Circuit's decision that concerned the Board's use of presumptions. Although the Board let the time for filing a petition for rehearing run in this case, it filed a document entitled, "Motion for Modification", in which it seeks the same relief that it seeks in the petitions for rehearing in *Beth Israel* and *St. Anthony*. Because the petitions for rehearing and the motion for modification are presently pending in the court of appeals, the petition for writ of certiorari is premature.

ARGUMENT

1. The writ should be denied because the Tenth Circuit's decision is not in conflict with a decision of another court of appeals on the same matter.

Since the passage in 1974 of the Health Care Amendments to the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (1976), the Second, Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have reviewed health care bargaining unit determinations made by the Board. *Vicksburg Hospital, Inc. v. N.L.R.B.*, 653 F.2d 1070 (5th Cir. 1981); *Presbyterian/St. Luke's Medical Center v. N.L.R.B.*, 653 F.2d 450 (10th Cir. 1981); *Mary Thompson Hospital, Inc. v. N.L.R.B.*, 621 F.2d 858 (7th Cir. 1980); *Allegheny General Hospital v. N.L.R.B.*, 608 F.2d 965 (3rd Cir. 1979); *N.L.R.B. v. Mercy Hospital Ass'n*, 606 F.2d 22 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (1980); *N.L.R.B. v. Sweetwater Hospital Ass'n*, 604 F.2d 454 (6th Cir. 1979); *N.L.R.B. v. St. Francis Hospital of Lynwood*, 601 F.2d 404 (9th Cir. 1979); *Bay Medical Center, Inc. v. N.L.R.B.*, 588 F.2d 1174 (6th Cir. 1978), *cert. denied*, 444 U.S. 827 (1979); *N.L.R.B. v. West Suburban Hospital*, 570 F.2d 213 (7th Cir. 1978); *St. Vincent's Hospital v. N.L.R.B.*, 567 F.2d 588 (3rd Cir. 1977). In each of these cases the court of appeals recognized that, as a general rule, the Board must certify broad rather than narrow bargaining units in the health care industry. Even those courts that enforced Board orders to bargain with a certified unit did so because the breadth of the unit did not contravene the congressional admonition to prevent proliferation of bargaining units in the health care industry.[2] *See* S.

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2. The only exception is the Sixth Circuit's decision in *Bay Medical Center, supra*, that enforced a Board order to bargain with a narrow unit of licensed practical nurses in light of an established prior bargaining history between the licensed practical nurses and the hospital.

Rep. No. 766, 93d Cong., 2d Sess. 5 (1974); H.R. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974).

The decision of the Tenth Circuit in this case follows this long line of prior court decisions. The Tenth Circuit's decision most closely follows that of the Ninth Circuit in *N.L.R.B. v. St. Francis Hospital of Lynwood, supra.* As in this case, the Ninth Circuit discussed the appropriateness of a separate bargaining unit for registered nurses, rather than including them in a unit of all professional employees. The court stated, in dicta:

> We view the language and the . . . legislative history of the 1974 Amendments to the Act as requiring the Board to determine not the similarities among employees in the same job classification (indeed the fact that they share the same classification would inevitably lead to the discovery of many similarities), but instead the "disparity of interests" among employee classifications which would prevent a combination of groups of employees into a single broader unit thereby minimizing unit proliferation. The congressional approval of the trend toward broader units in the health care industry indicates an awareness that the traditional factor of community of interests would be subordinated to the directive against undue proliferation. However, by including nonprofit hospitals within the Act, Congress sought to extend to hospital employees effective labor rights. By focusing on the disparity of interests between employee groups which would prohibit or inhibit fair representation of employee interests, a balance can be made between the congressional directive and the employee's right to representation. *St. Francis, supra* at 419.

The Ninth Circuit's language was adopted by the Tenth Circuit in this case and, to date, no court of appeals has

rejected either the concept of broad units or the applicability of the disparity of interests test in scrutinizing health care bargaining unit determinations.[3]

Therefore, because there is no conflict among the courts of appeals, review by this Court is neither necessary nor warranted at this time.

2. The writ should be denied because the case is presently pending before the Board on remand.

By letter dated October 22, 1981, counsel for all parties in this case were notified that the Board had accepted the case on remand and were given the opportunity to submit statements of position to the Board concerning the disposition of the case. Statements of position were filed by all parties on or before November 10, 1981. To date, no further action has been taken by the Board.

Because the court of appeals remanded the case to the Board, and because the Board has not yet acted, the case is not ripe for review by this Court. *Brotherhood of Locomotive Firemen and Engineermen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967). Thus, the petition for writ of certiorari should be denied.

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3. A case that presents the identical issue of the appropriateness of a separate bargaining unit for registered nurses is presently pending in the Fourth Circuit, *N.L.R.B. v. Frederick Memorial Hospital, Inc.*, No. 81-1672.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Opposition

2

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ST. ANTHONY HOSPITAL SYSTEMS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT ST. ANTHONY HOSPITAL SYSTEMS

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QUESTIONS PRESENTED

Expressed in the circumstances of this case, the questions presented are:

1. Did the Court below err in holding that the NLRB cannot ignore the legislative history of the 1974 Amendments to the Taft-Hartley Act extending that Act to health care institutions, and cannot refuse to follow the congressional admonition to prevent proliferation of bargaining units?

2. Did the Court below err in holding that the NLRB cannot adopt a virtually irrebutable presumption in issuing unit determinations for the health care industry which shifts both the burden of production and the burden of persuasion to the Respondent Hospital?

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit below in *St. Anthony Hospital Systems, Petitioner, v. National Labor Relations Board, Respondent, and St. Anthony's Federation of Nurses and Health Professionals, Intervenor*[1] is not yet officially reported, but is unofficially reported at 107 LRRM 3336. It is also set forth verbatim in attached Appendix A at A-1. The companion decision of that court in *Presbyterian/St. Luke's Medical Center, Petitioner, v. National Labor Relations Board, Respondent,* and *St. Luke's Federation of Nurses and Health Professionals, Intervenor,* is officially reported at 653 F.2d 450, and is set forth verbatim in the attached Appendix B at B-1.[2]

GROUNDS FOR JURISDICTION

The decision in this case was filed by the United States Court of Appeals for the Tenth Circuit on August 4, 1981. The National Labor Relations Board subsequently filed a Petition for Rehearing, and Suggestion for Rehearing In Banc limited to the question whether the Federal Rules of Evidence were applicable on the record in the case and whether the NLRB's use of presumptions improperly relieved the General Counsel of the NLRB of his burden to establish that an unfair labor

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[1]The caption of the case in this court does not contain the names of all parties. The National Labor Relations Board, which was the respondent in the three related cases before the Tenth Circuit below, is not a party in this matter of the Petition for Writ of Certiorari. All other parties below are parties in this matter on the Petition for Writ of Certiorari.

[2]A third companion case, *Beth Israel Hospital and Geriatrics Center, Petitioner v. National Labor Relations Board, Respondent, and Beth Israel Federation of Nurses and Health Professionals, Intervenor,* was decided at or about the same time involving the basic issues on this Petition. This decision is not yet officially reported, and is unofficially reported at 107 LRRM 3214. Like the *St. Anthony* decision, the *Beth Israel* decision is governed by the *Presbyterian/St. Luke's* decision.

practice has occurred by a preponderance of the evidence. No decision has yet been entered by the United States Court of Appeals for the Tenth Circuit with respect to such Petition for Rehearing. An extension of time was granted by Justice Byron R. White authorizing the filing of the Petition for Writ of Certiorari in this case on or before November 18, 1981. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (Taft-Hartley Act) as amended, 29 U.S.S. §151, *et seq.*, will be set forth in the text of this Brief in Opposition.

STATEMENT

The NLRB Proceedings.

A group of nurses at St. Anthony Hospital calling themselves the "St. Anthony Federation of Nurses and Health Professionals," hereinafter referred to as the "FNHP," filed a Petition with the National Labor Relations Board in late 1979. This Petition requested an election to determine whether a majority of employees employed as professional Registered Nurses at the hospital favored union representation. App. F, pp. 79a-80a.

The Hospital challenged the Petition on a number of grounds and extensive hearings were held before the NLRB in October 1979. At that time, no bargaining unit in the health care industry in Colorado had been limited to only Registered Nurses (Tr. 219). On December 17, 1979, the NLRB's Regional Director issued his Decision and Direction of Election. This decision adopted the unit exactly as petitioned for by the FNHP and held the following constituted an appropriate unit for purposes of collective bargaining with the Hospital:

> All full-time and regular part-time registered nurses employed by the Employer at its St.

> Anthony Central and St. Anthony North facilities; excluding the director of nursing services, associate director of nursing services, director of patient care services for the North facility, shift operation managers, nursing services supervisors, and all other employees, guards and supervisors as defined by the Act.

App. F., p. 91a.

An election was held in January 1980 with a majority of employees in that unit voting in favor of representation by the FNHP. The FNHP was certified by the NLRB on or about January 31, 1980. App. F., p. 77a.

In order to obtain judicial review of this decision, the Hospital on or about May 9, 1980, and at all times thereafter, committed a technical unfair labor practice by refusing to bargain collectively with the FNHP. The FNHP filed an unfair labor practice charge with the NLRB, and it issued a Complaint and Notice of Hearing on that charge. App. F., p. 76a.

The hospital answered the Board's complaint and contested the Board's determination of the appropriate bargaining unit, among other issues. On July 2, 1980, the General Counsel of the Board filed with it a Motion for Summary Judgment. The Hospital filed a response opposing Summary Judgment, arguing that the question of undue proliferation of bargaining units raised by the legislative history in the 1974 Amendments to the Act was never properly considered by the Regional Director's determination. The NLRB granted the Motion for Summary Judgment refusing any hearing on the issue of undue proliferation. App. F., pp. 76a-87a.

The final decision of the Board was issued on September 9, 1980, and served upon the Hospital on September 13, 1980. St. Anthony Hospital Systems filed its Petition for Review of that decision with the United States Court of Appeals for the Tenth Circuit on September 15, 1980. Oral argument was subsequently held and the United States Court of Appeals for the Tenth Circuit issued its decision on August 4, 1981.

Findings and Conclusions In Issue By The Court Below.

In each of the two companion decisions reached by the Court of Appeals below, the issue was whether a separate collective bargaining unit solely comprised of professional registered nurses was appropriate under the 1974 Health Care Amendments to the National Labor Relations Act, as amended. The Court of Appeals below in each of the cases held that such a separate unit was not appropriate.

In reaching that decision, the court held in *Presbyterian/St. Luke's Medical Center v. National Labor Relations Board, and St. Luke's Federation of Nurses and Health Professionals, Intervenor,* that:

> In the representation proceeding, the regional director ruled that (a) a unit restricted to registered nurses is presumptively appropriate, and (b) based on the Board's singularity of interests analysis, the presumption in favor of the registered nurses unit was not *overcome* by the Medical Center. Inasmuch as the Board erred in accepting the presumption of appropriateness, we must deny enforcement of its order. App. B, p. 9.

The court later held that on review of the record, the Board used its presumption to allow it to refuse to consider admissible evidence introduced by the Hospital to sustain the appropriateness of an all professional unit:

> Our review of the record convinces us that the rebuttable presumption applied in this case shifted *both* the burdens of producing evidence *and* persuation. The regional director specifically held that the presumption was not overcome by the Medical Center's evidence.
>
> In our view, there was sufficient evidence adduced to sustain the appropriateness of an all

> professional unit, excluding physicians. We, of course, focus on the "disparity of interests between employee groups which would prohibit or impede fair representation of employee interests." *N.L.R.B. v. St. Francis Hospital of Lynwood, supra,* at p. 419 . . . . App. B., p. 10.

The court then concluded that:

> Application of the presumption employed here violated the mandate of Federal Rule of Evidence 301. Such a presumption cannot be used to alter General Counsel's burden to establish by a preponderance of evidence that an unfair labor practice has occurred. [Citing cases.] [Footnote omitted.] App. B, pp. 11-12.

The court below then pointed out that it did not rest its decision on that ground alone. The court pointed out that by indulging in the presumptions utilized by it, the Board shifted the burden of producing evidence to the Hospital to show the inappropriateness of the unit, and in the court's view this violated the congressional directive that the Board must make its own unit determination avoiding nonproliferation of units in the health care industry. In this regard, the court held as follows:

> . . . . The legislative history underlying the 1974 Amendments expresses concern that egregious unit proliferation such as found in the construction trades, could impede effective health care delivery. We agree with our sister circuit that "the Board *must* expressly consider the congressional admonition in making unit determinations," Mary Thompson Hospital, Inc. v. N.L.R.B., supra, at p. 864, and focus on the "disparity of interests between employee groups which would prohibit or inhibit fair representation of employee interests." *N.L.R.B. v. St. Francis Hospital of Lynwood, supra,* at p. 419. [Emphasis added.]

> We hold that requiring health care industry employers to bear the burden of producing evidence that limited bargaining units are more inappropriate than broader bargaining units runs contrary to Congress' admonition. Rather, the Board must specify "the manner in which its unit determination in this case implement[s] or reflect[s] that admonition." *N.L.R.B. v. West Suburban Hospital, supra,* at p. 216. App. B, pp. 12-13.

The court below had earlier in its opinion reviewed the comprehensive legislative history of the 1974 Amendments extending coverage under the Act to health care employers. The court specifically focused on the committee reports of the House and Senate committees both of which expressed the congressional admonition that:

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the committee notes with approval the recent Board decisions in *Four Seasons Nursing Center,* 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital,* 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia,* 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]
>
> [1]By our reference to *Extendicare,* we do not necessarily approve of all of the holdings of that decision.
>
> S. Conf. Rept. No. 988, 93d Cong., 2d Sess., reprinted in (1974), U.S. Code Cong. & Admin. News pp. 3946, 3950; S. Rept. No. 766, 93d Cong., 2d Sess. 5 (1974); H. Rept. No. 1051, 93d Cong., 2d Sess. 7 (1974). App. B, p. 5.

In its instant decision in *St. Anthony Hospital Systems, Petitioner, v. National Labor Relations Board,*

Respondent, and St. Anthony's Federation of Nurses and Health Professionals, Intervenor, the Court adopted as disposing of the issues in the *St. Anthony* case its holding in *Presbyterian/St. Luke's Medical Center v. N.L.R.B.*, both as to the Board's application of the virtually irrebuttable presumption that a unit restricted to registered nurses is appropriate, and its holding that the Board did not follow the congressional directive against proliferation of units in the health care industry. The court's opinion on these points in the instant case is as follows:

> In granting the General Counsel's motion for summary judgment and affirming the regional director's decision, the Board clearly seems to have accepted the director's reasoning, based on *Mercy Hospital of Sacramento, Inc.*, 217 N.L.R.B. 765 (1975), and *Allegheny General Hospital*, 239 N.L.R.B. 872 (1978), "that a unit restricted to registered nurses is a presumptively appropriate one," and that in this case "the presumption . . . has not been overcome by the Employer's evidence." R. Vol. V at 3244. *See, Id.*, at 3311. Acknowledging *N.L.R.B. v. St. Francis Hospital of Lynwood*, 601 F.2d 404 (9th Cir. 1979), the regional director and the Board applied a rebutable presumption that the nurse unit was appropriate. Nevertheless, we believe the opinions clearly do not go far enough in following the congressional directive. *See*, R. Vol. V at 3244-45, 3331-12.
>
> On the appropriate unit issue, the case at bar is identical in all significant respects to *Presbyterian/St. Luke's Medical Center v. N.L.R.B.*, No. 80-1246 (10th Cir., July 7, 1981), in which we held the Board's application of the rebuttable presumption both impermissibly shifts the burden of persuasion and violates Congress' directive to avoid proliferation of bargaining

units in the health care industry. Our holding in *Presbyterian/St. Luke's Medical Center* is fully applicable to this case. We hold the Board's unit determination, based on the presumption of appropriateness and a duty in the employer to overcome it, improperly relieved the General Counsel of the burden to establish that an unfair labor practice occurred. Because our holding on this issue renders the Board's order unenforceable, we find it unnecessary to address St. Anthony's remaining contention that the Board improperly included staff nurse I employees in the bargaining unit. App. A, pp. 5-6.

SUMMARY OF ARGUMENT

I.

CONGRESS DIRECTED IN THE 1974 HEALTH CARE AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT THAT THE NLRB MUST AVOID PROLIFERATION OF BARGAINING UNITS IN THE HEALTH CARE INDUSTRY.

II.

THAT CONGRESSIONAL POLICY WAS BASED ON CONCERN THAT UNIT FRAGMENTATION IN THE HEALTH CARE INDUSTRY WOULD CREATE JURISDICTIONAL DISPUTES, WORK STOPPAGES, AND INCREASED COSTS OF MEDICAL CARE TO THE DETRIMENT OF HEALTH CARE SERVICES TO BE PROVIDED.

III.

THE COURT BELOW FOLLOWED THE VIRTUALLY UNBROKEN CHAIN OF AUTHORITY SINCE THE 1974 AMENDMENTS AND CORRECTLY HELD THAT THE NLRB FAILED TO FOLLOW THE CON-

GRESSIONAL POLICY IN HOLDING A SEPARATE PROFESSIONAL UNIT LIMITED TO REGISTERED NURSES PRESUMPTIVELY APPROPRIATE.

IV.

THE NATIONAL LABOR RELATIONS ACT BY ITS TERMS REQUIRES THAT THE NLRB MAKE ITS OWN BARGAINING UNIT DETERMINATION AND STATE THE GROUNDS FOR ITS DETERMINATION IN THE RECORD, AND THE NLRB CANNOT IN ANY MANNER SHIFT THIS DUTY TO THE EMPLOYER-HOSPITAL.

V.

THE COURT BELOW CORRECTLY RULED THAT THE NLRB PRESUMPTION WAS IMPROPERLY APPLIED TO SHIFT BOTH THE BURDEN OF PRODUCTION AND PERSUASION TO THE EMPLOYER HOSPITAL IN VIOLATION OF THE ACT AND THE CONGRESSIONAL POLICY, AND FEDERAL RULE OF EVIDENCE 301.

ARGUMENT

I.

THE LEGISLATIVE HISTORY CONCERNING THE 1974 HEALTH CARE AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT ESTABLISHES THAT CONGRESS REQUIRED THAT THE BOARD ITSELF MUST ADOPT NON-TRADITIONAL STANDARDS AND MAKE ITS OWN UNIT DETERMINATIONS IN THE HEALTH CARE INDUSTRY TO AVOID PROLIFERATION OF UNITS. THE COURT BELOW PROPERLY HELD THAT THE NATIONAL LABOR RELATIONS BOARD VIOLATED ITS STATUTORY DUTY IN IGNORING THE CONGRESSIONAL ADMONITION.

Legislative History, 1974 Amendments.

The reviewing court must see exactly how the National Labor Relations Board has determined the unit appropriate for collective bargaining purposes. This duty of the Board is particularly significant under the 1974 Amendments to the National Labor Relations Act, extending coverage of that Act to health care industry employers. Prior to 1974, the National Labor Relations Act excluded non-profit hospitals from the definition of 'employer" covered by the Act. 29 U.S.C. §152(2). In 1974, bills were introduced in the United States House of Representatives, HR 13678, 93 Cong. 2d sec. (1974), and the United States Senate S. 3203, 93 Cong. 2d sec. (1974), to extend coverage of the Act to all non-profit health care facilities. The Senate bill was passed over the House bill and, with certain amendments, became law in the summer of 1974. The 1974 Amendments to the National Labor Relations Act, Pub. L. No. 93-360; 88 Stat. 395 (1974).

Throughout consideration of these bills, Congress showed clear concern that the unique business of providing medical care to the sick and injured required special care to avoid disruption of those services, and in fact the need to minimize disruptions due to labor disputes were cited as a key reason for passing the bill. S. Rep. No. 93-766, 93 Cong. 2d Sec. (1974) reprinted in [1974] (U.S. Code Cong. and Admin. News 3936, 3948.) This concern was expressed both in expansion of the Act's §8(d)(1) Notice Requirement for Collective Bargaining Agreement Terminations, extending the 60 day notice provision for general industry to 90 days in the case of the health care industry, and of the Act's §8(d)(3) Notice Requirements to the Federal Mediation and Conciliation Service, from the 30 days notice required in industry to 60 days in cases involving employees in the health care industry. 1974 Amendments, Pub. L. No. 93-360, 88 Stat. 395, §D(1)(A), (C); S. Rep. 93-766, [1974] U.S. Code Cong. and Admin. New 3950. Additional evidence of the

strength of this congressional concern is found in the addition of a separate ten day notice requirement in the health care industry preceding in strike, picketing or other refusal to work, 1974 Amendments, Pub. L. No. 93-360, 88 Stat. 395, §(e), 29 U.S.C. §158(g), and Congress's directive to the Board to expedite handling of all cases involving health care institutions, S. Rep. 93-766, [1974] U.S. Cong, and Admin. News 3951-52.

The Committee reports required, as stated earlier herein, p. 7, *supra,* in line with the concern for potential disruption of patient care, that:

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the committee notes with approval the recent Board decisions and *Four Seasons Nursing Center,* 208 NLRB No. 50, 85 LRRM 8093 (1974) and *Woodland Park Hospital,* 205 NLRB No. 144, 85 LRRM 1075 (1973), as well as a trend toward broader units enunciated in *Extendicare of West Virginia,* 203 NLRB No. 170, 83 LRRM 1242 (1973).

This was a clear congressional requirement that the Board take a special approach in determining units in the health care industry and make a special and active effort to minimize the number of units found appropriate. Senator Taft, the author and co-sponsor of the Senate bill which was ultimately passed, described the bill and its background and argued the need for the bill as follows:

> The issue of proliferation of bargaining units in health care institutions has also greatly concerned me during consideration of legislation in this area. Hospitals and other types of health care institutions are particularly vulnerable to a multiplicity of bargaining units due to the diversified nature of the medical services provided patients. If each professional interest and

> job classification is permitted to form a separate bargaining unit, numerous administrative and labor relations problems become involved in the delivery of health care. The provisions of S. 2292 placed a statutory limit of four bargaining units in a health care institution. While this precise approach was not adopted by the committee, report language was agreed upon to stress the necessity to the Board to reduce and limit the number of bargaining units in a health care institution . . . .
>
> . . . . I cannot stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages must be prevented. The administrative problems from a practical operation viewpoint and labor relations viewpoint must be considered by the Board on this issue. Health care institutions must not be permitted to go the route of other industries, particularly the construction trades in this regard.
>
> In analyzing the issue of bargaining units, the Board should also consider the issue of cost of medical care. Undue unit proliferation must not be permitted to create wage "leap frogging" and "whipsawing". The cost of medical care in this county has already skyrocketed, and costs must be maintained at a reasonable level to permit adequate health care for Americans from all economic sectors.

120 Cong. Rec. 12944-12945 (1974).

At the time the Senate conference report was considered, another Senator, Senator Williams, made the following remarks in the context of complimenting the National Labor Relations Board in newly covered industries:

> . . . . While the Board has, as a rule, tended to avoid an unnecessary proliferation of collective bargaining units, sometimes circumstances required that there be a number of bargaining units among non-supervisory employees, particularly where there is such a history in the area or a *notable disparity of interests* between employees in different job classifications.

120 Cong. Rec. 22575 (July 10, 1974) ("Senator Williams' Remarks").

In an unbroken chain of decisions of all courts of appeals which have reviewed NLRB bargaining unit determinations under the 1974 Health Care Amendments, these courts have virtually unanimously agreed that the Board has not adopted the necessary special unit determination standards in the health care industry to avoid proliferation of units. *Memorial Hospital of Roxborough vs. N.L.R.B.*, 545 F.2d 351, 361 (3rd Cir. 1976); *Long Island College Hospital vs. National Labor Relations Board*, 566 F.2d 833, 844 (2nd Cir. 1977), *cert. denied*, 435 U.S. 996, 98 S.Ct. 1647, 56 L.Ed. 2d 84 (1978); *St. Vincent's Hospital vs. National Labor Relations Board*, 567 F.2d 588, 592 (3rd Cir. 1977); *N.L.R.B. vs. West Suburban Hospital*, 570 F.2d 213, 215 (7th Cir. 1978); *NLRB vs. St. Francis Hospital of Lynwood*, 601 F.2d 404, 414, 418, 419 (9th Cir. 1979); *N.L.R.B. v. Mercy Hospital Ass'n.*, 606 F.2d 22, 25-26, 27 (2d Cir. 1979), *cert. denied*, 445 U.S. 971, 100 S.Ct. 1645, 64 L.Ed. 2d 248 (1980); *Allegheny General Hospital v. N.L.R.B.*, 608 F.2d 965, 966 (3rd Cir. 1979); *Mary Thompson Hospital, Inc., v. N.L.R.B.*, 621 F.2d 858, 861, 864 (8th Cir. 1980).[3]

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[3]In *N.L.R.B. v. Sweetwater Hospital Assn'n.*, 604 F.2d 454 (6th Cir. 1979), the United States Court of Appeals for the Sixth Circuit found that the Board had given proper consideration to the congressional directive to avoid proliferation of bargaining units in health care facilities, but in a footnote made clear that the Board must stop with only two units for all non-professional employees at the hospital. The court expressly pointed out that if the Board were to create additional units for non-professionals, that would violate the non-proliferation directive of the Congress. 604 F.2d at 457-58, n. 7. Cf. also *Vicksburg Hospital Inc. v. N.L.R.B.*, 653 F.2d 1070 (5th Cir. 1981).

Standards To Measure Legislative History.

This legislative history and the comprehensive treatment by the federal courts of appeal in implementing the legislative history in reviewing Board decisions carries into effect this Court's articulation of the standards in considering legislative history. In *Textile Workers of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed. 2d 972 (1957), this Court pointed out in reviewing the legislative history of the Taft-Hartley Act in another context, that the legislative history consists of (a) the bills as they pass the House and Senate, (b) conference reports, (c) the Senate and House reports, and (d) comments of the sponsors of the legislation. This Court has further held that the federal courts reviewing NLRB decision must not permit the NLRB to frustrate "congressional policy" underlying the National Labor Relations Act, as amended, *N.L.R.B. v. Brown*, 380 U.S. 278, 292, 85 S.Ct. 980, 13 L.Ed. 2d 839, 849 (1965). The federal appellate courts have carried the standards of such review into effect in reviewing NLRB unit determinations in the health care industry. And it is the legislative history so contained that the federal appellate courts have consistently ruled that the Board has failed to heed.

The argument of Petitioners at page 12-13 of the Petition that the 1974 Health Care Amendments left the Board with an unfettered discretion to determine appropriate bargaining units in the health care industry, and to rely on its traditional standards, such as the singularity of interest tests, as asserted at page 19 of the Petition, is simply wrong. The related argument of Petitioners at page 15 in the Petition that the committee reports, the congressional record, and other matters in the legislative history are not the law and that the Board need not be bound by such legislative history is also plainly wrong. No authority was cited by Petitioners that

the Board could or should ignore this clear and binding congressional intent in the legislative history.[4]

II.

THE COURT OF APPEALS BELOW IN JUDICIAL REVIEW PROCEEDINGS ON THE BOARD'S UNFAIR LABOR PRACTICE ORDER MUST REVIEW THE RECORD IN THE REPRESENTATION CASE, AND IS REQUIRED TO PROVIDE THE SAME COURT REVIEW OF THAT RECORD IN THE REPRESENTATION PROCEEDING AS THE RECORD IN THE UNFAIR LABOR PRACTICE PROCEEDINGS. THE ACT ITSELF REQUIRES THAT SUCH RECORD AND PROCEEDINGS BE CONDUCTED IN ACCORDANCE WITH THE RULES OF EVIDENCE APPLICABLE IN THE DISTRICT COURTS OF THE UNITED STATES. THE COURT OF APPEALS BELOW PROPERLY APPLIED THE FEDERAL RULES OF EVIDENCE TO THE PRESUMPTIONS UTILIZED BY THE BOARD IN THE RECORD BEFORE IT AS REQUIRED BY THE ACT.

Statutory Provisions.

Revelant statutory provisions of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq., are as set forth. The Act requires the Board to determine the appropriate bargaining unit, 29 U.S.C. §159(b):

> *"The board shall decide in each case* whether, in order to insure to employees the fullest freedom in exercising their rights guaranteed by this sub-chapter, the Unit appropriate for the purposes of collective bargaining. . . .[And see

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[4]The only "authority" of Petitioner is the sole dissent of Judge Fairchild in *Mary Thompson Hospital v. N.L.R.B., supra*, 621 F.2d at 864. Judge Fairchild believed that the legislative history was not for the courts to consider, but was merely a "matter" between the Congress and the Board. Judge Fairchild's dictum has not been followed by any legal authority.

> 29 U.S.C. §153(b), as amended, authorizing the Board to delegate to its Regional Directors it powers under §159 of this title to determine appropriate units for the purposes of collective bargaining.] [Emphasis added.]

The Act, 29 U.S.C. §159(d), then sets forth the standards for judicial review of the bargaining unit determination made by the Board and provides that the record on review is the record in *both* the certification in the representation case hearings and the subsequent unfair labor practice proceeding:

> Whenever an order of the Board made pursuant to §160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to sub-section (c) of this section and there is a petition for the enforcement or review of such order, *such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under sub-section (e) or (f) of §160 of this title,* and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board *shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.* [Emphasis added.]

An Order of the Board under §160(c) of the Act refers to proceedings of the Board concerning unfair labor practices charges against Respondents under the Act. The statute then provides for judicial review of orders of the Board entered in such unfair labor practice proceedings is based upon the whole record in both the representation and unfair labor practice proceedings, 29 U.S.C. §160(e):

> . . . [T]he Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have

> power to have such temporary relief or restraining order as it deems just and proper and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . . The findings of the Board with respect to questions of fact if supported by the substantial evidence on *the record considered as a whole* shall be conclusive . . . . [Emphasis added.]

The Act clearly provided that in all such unfair labor practice proceedings, the Federal Rules of Evidence apply so far as practicable, 29 U.S.C. §160(b):

> . . . Any such [unfair labor practice] proceedings shall so far as practicable, be conducted in accordance with the Rules of Evidence applicable in the district courts of the United States under the Rules of Civil Procedure for the district courts of the United States pursuant to Section 2072 of Title 28.

Court Review of the Statutory Provisions.

This Court stated the duty of the courts of appeals in reviewing NLRB determinations under the Act in its decision in *Universal Camera Corp. vs. N.L.R.B.*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), stating in relevant part at 340 U.S. 490:

> The Board's findings are entitled to respect; but they must nonetheless be set aside when the *record before a court of appeals* clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its competence or both. [Emphasis added.]

Later in a landmark decision concerning judicial review of NLRB decisions, this Court in *Boire vs. Greyhound Corp.*, 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed. 2d 849

(1964), confirmed that the record certified in the representation case proceeding before the Board must also be included in the transcript of the unfair labor practice proceeding so that the entire record in the case is presented to the Appellate Court. This Court at 376 U.S. 478, nn. 5 and 6 in the *Boire vs. Greyhound Corp., supra,* decision, made this clear. In note 5 therein this Court stated:

> "Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to §10(e) or (f), the Board's actions and determinations of fact and law in regard thereto will be subject to the *same court review* as is provided for its other determinations under §10(b) and 10(c). [Emphasis added.]

In note 6 in the same opinion, this Court further elaborated on the inclusion of the bargaining unit determination record in the representation case into the total record in the unfair labor practice proceedings, in relevant part as follows:

> "An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employer or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, *then the entire election procedure becomes part of the record upon which the order of the Board is based,* and is fully reviewable by any aggrieved party in the *federal courts* in the manner provided in §10. *And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election.* This provides a complete guarantee against

> arbitrary action by the Board. [Emphasis Added.]

Later this Court emphasized in *Magnesium Casting Co. vs. National Labor Relations Board,* 401 U.S. 137, 91 S.Ct. 599, 27 L.Ed. 2d 735 (1971) that the amendments to the Act authorizing the delegation to regional directors of the Board's authority to make unit determinations was proper. This court's decision was based on the fact that the record of those determinations by the regional directors would likewise accompany any unfair labor practice proceedings record to the reviewing Court of the Appeals, as follows:

> If adopted by the trial examiner in an unfair labor practice proceeding [the representation case proceeding] accompanies a case both to the Board and to the court of appeals. In the present case, the court of appeals concluded that the Board's order was supported by "substantial evidence."

401 U.S. 142-143.

The Federal Court of Appeals have made clear that in unit determination cases, the record in such matters is part of the entire record in the subsequent unfair labor practice proceeding when judicial review is obtained, and that such unit determination record is at that point fully subject even to the Administrative Procedure Act Standards. See, for example, *National Labor Relations Board vs. Clement-Blythe Companies,* 415 F.2d 78 at 8081 (4th Cir. 1969) as follows:

> We previously have upheld the Board's use of summary judgment when the basis for the employer's refusal to bargain was the same that was litigated in the underlying representation hearing. We do not condemn this practice now. But the use of summary judgment in deciding whether an employer has committed an unfair labor practice does not exempt the Board from

complying with the administrative Procedure Act [5 U.S.C. §557(c)], which requires that:

> All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of —
>
> > (A) Findings and conclusions, and the reasons or bases therefor, on all the material issues of fact, law or discretion presented on the record***.

The Court of Appeals in that case declined to enforce the Board's order because the record disclosed that in the representation case proceeding, the Board did not state its reasons for its determination of the appropriate unit. Like the instant case, where the Board merely held that the hospital had not rebutted the presumption of appropriateness of a single professional unit for registered nurses, there were no independent findings in the record in that case showing precisely how the Board had determined the appropriate unit. Thus the deficiency in the representation case record made reviewable in the court of appeals when it was included in the entire record in the unfair labor practice proceeding made the NLRB decision unenforceable. See *Meyer Dairy, Inc., v. National Labor Relations Board,* 429 F.2d 697, 700 (10th Cir. 1970); *National Labor Relations Board v. Marinor Inns, Inc.,* 445 F.2d 538, 543-544, (5th Cir. 1971).

The Board's Presumptions And The Burden of Proof

The duty of the Board to make its own specific and clearly enunciated findings concerning its determination of the appropriateness of bargaining units is well established. *Packard Motor Car Co. v. N.L.R.B.,* 330 U.S. 485, 67 S.Ct. 789, 91 L.Ed. 1040 (1947). But the NLRB cannot

exercise its discretion in such a manner as to overstep the law in making its bargaining unit determinations, *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 171, 92 S.Ct. 383, 30 L.Ed. 2d 341, 353 (1971). This Court has established that it is a particular duty of the reviewing court of appeals to insure that the NLRB in its determinations does not issue rulings in conflict with congressional intent. *N.L.R.B. v. Brown*, 380 U.S. 278, 292, 85 S.Ct. 980, 13 L.Ed. 2d 839, 849 (1965). Further, in *N.L.R.B. v. Brown, supra*, the Supreme Court affirmed the decision of this same Tenth Circuit Court of Appeals denying enforcement of an NLRB order based on NLRB inferences that certain conduct "carried its own indicia of unlawful intent" in the absence of evidence produced by the general counsel that the employer acted from unlawful motives and with anti-union intent. 380 U.S. at 292, 13 L.Ed. 2d at 849.

To the same effect, this Court has long held that the burden of proof of violation of the Act cannot be shifted away from the general counsel to one of the private parties to prove compliance with the Act. For example, in *Local Lodge No. 1424, I.A.M. v. N.L.R.B.*, 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed. 2d 832 (1960), this court struck down a Board presumption of illegality concerning a certain type of contract union security clause (a clause mandatorily requiring union membership as a condition for retention of employment). Such a presumption would shift the burden of persuasion so that sufficient proof of violation of the Act would result merely from a showing that the clause was in effect. See 362 U.S. 418, at n. 7. This Court noted that such a presumption would put on the party to the agreement the burden to defend the legality of same by proving *compliance* with the Act. This Court noted that such a presumption was rejected by a majority of the NLRB members, and this Court held "We too reject it." *Id.*

The Board's effort to use presumptions to shift its ultimate burden of persuasion in this case shares no

better fate. This Court in *N.L.R.B. v. Baptist Hospital, Inc.*, 442 U.S. 773, 99 S.Ct. 2598, 61 L.Ed. 2d 251 (1979) recently reviewed the Board's presumption concerning invalidity of no-solicitation rules. This Court noted that the Board's presumption in that case did "no more" than place on the hospital the burden of providing evidence that union solicitation may adversely affect patients. 442 U.S. at 781. This Court held that the hospital had met its burden of production and had rebutted the presumption in those areas, and in fact then overturned the NLRB's presumption. 442 U.S. at 785. In issuing its decision in *N.L.R.B. v. Baptist Hospital, Inc., supra*, this Court set forth a standard for review of the NLRB's use of presumptions:

> It is, of course, settled law that a presumption adopted and applied by the Board must rest on a sound factual connection between approved and inferred facts. As the court stated in *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 804-805, 89 L.Ed. 1372, 65 S.Ct. 982, 157 ALR 1081 (1945), "[L]ike a statutory presumption or one established by regulation, the validity [of the Board's presumption regarding the permissibility of no-solicitation rules], perhaps in a varying degree, depends upon the rationality between what is proved and what is inferred." More recently, in *Beth Israel*, the Court again recognized that the courts have the duty to review the Board's presumptions both "for consistency with the Act, and for rationality." 437 U.S. at 501, 57 L.Ed. 2d 370, 98 S.Ct. 2463.

442 U.S. at 787. It is particularly significant that this Court in *N.L.R.B. v. Baptist Hospital, Inc., supra* cited with approval the decision of the United States Court of Appeals for the Tenth Circuit in *St. John's Hospital and*

School of Nursing, Inc., v. N.L.R.B., 557 F.2d 1368 (1977), where the Court of Appeals found the NLRB's presumption concerning solicitation in hospital areas to be unsupported by the evidence. *See*, 442 U.S. at 778-779.

This Court has recently considered the issue involving burdens of proof under a sister statute, Title VII, the Federal Civil Rights Act of 1964, as amended, and held that Defendants in Title VII litigation cannot be held to have both the burden of production *and* the burden of persuasion to rebut claims of discrimination. *Texas Department of Community Affairs v. Burdine*, ___ U.S. ___, 101 S.Ct. ___, 67 L.Ed. 2d 207 (1981). In that case, this Court pointed out the burden of persuasion never shifts to the employer:

> The defendant need not persuade the court that it was actually motivated by the proffered reasons. *See, Sweeney, supra*, at 25, 58 L.Ed. 2d 216, 99 S.Ct. 295. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. [Footnotes omitted.]

67 L.Ed. 2d at 216-217, 25 FEP Cases at 116. This court specifically held that the plaintiff retains the burden of persuasion. 67 L.Ed. 2d at 217.

The reason is that the burden of persuasion in both the Civil Rights Act and the National Labor Relations Act is *always* on the plaintiff or the Board, respectively, though its General Counsel, and *never shifts. Texas Department of Community Affairs v. Burdine, supra; N.L.R.B. v. Winter Garden Citrus Products Co-ops,* 260 F.2d 913 at 916 (5th Cir. 1958); *N.L.R.B. v. Howard Quarries Company,* 362 F.2d 236, 242 (8th Cir. 1966); *N.L.R.B. v. Cone Mills Corp.,* 373 F.2d 595, 601 (4th Cir. 1967). This rule is of long standing in the Tenth Judicial Circuit, *N.L.R.B. v. Tepper,* 297 F.2d 280 (10th Cir. 1961); *Cain's Coffee Company v. N.L.R.B.,* 404 F.2d 1172 (10th Cir. 1968); *N.L.R.B. v. First National Bank of Pueblo,* 623 F.2d 686 (10th Cir. 1980); *N.L.R.B. v. Dillon Stores,* 643 F.2d 687 (10th Cir. 1981).

In this case, the Court of Appeals held that the use of the presumption not only violates the Act, as confirmed in the legislative history of the same to avoid unit proliferation, but also violates the Act in shifting the burden of determining the inappropriate unit to the Respondent hospital, rather than insuring that the Board itself make its own bargaining unit determination and articulate its own rationale and standard for such unit determinations as is its duty under the Act. *See,* pp. 6-7 in this Brief, *supra.* Its holdings are clearly correct and fully in line with the authorities cited herein.

Federal Rule Of Evidence 301.

The Act, 29 U.S.C. §160(b) as stated earlier in this Brief in Opposition, provides clearly that in all unfair labor practice proceedings, the Federal Rules of Evidence and the Federal Rules of Civil Procedure apply so far as practicable. Since the record in the unfair labor practice case in unit determination issues also includes the representation case record. *Boire v. Greyhound Corp.,* 376 U.S.

473, 84 S.Ct. 894, 11 L.Ed. 2d 849 (1964), as clearly provided in the Act itself, 29 U.S.C. §159(d) and 29 U.S.C. §160(e), the Federal Rules of Evidence insofar as practicable are made applicable to review of that record by the terms of the Act itself.

Indeed, federal appellate courts, even when the Federal Rules of Evidence were merely "proposed" rules, recognized their applicability to NLRB proceedings in judicial review of Board orders. In *N.L.R.B. v. Tragnieu, Inc.*, 470 F.2d 669, 674-675 (9th Cir. 1972), the court of appeals held as follows:

> Presumptions in the law are a procedural substitute for evidence. They recognize the probability of a fact and impose the proof of a nonexistence of that fact upon the party against whom the presumption is asserted. See, Proposed Federal Rules of Evidence, Rule 301; McCormick Evidence, Section 309 (1954); 29 Am. Jur. 2d Evidence Section 165 (1967). The presumption of majority representation here involved is rebuttable by clear, cogent and convincing evidence. [Citing cases.] The findings of the trial examiner rebut the presumption of majority status on which the Board relies. The Board may not displace the uncontroverted factual findings of the trial examiner by a presumption, accordingly, enforcement of the order the Board directing Tragnieu to bargain with Local 399 is denied.

Petitioners assert that courts of appeal have squarely held that Federal Rule of Evidence 301 is inapplicable to review of representation case decisions in review of NLRB's unfair labor practice orders, citing *Prudential Insurance Company of America v. N.L.R.B.*, 539 F.2d 66 at 68 (6th Cir. 1976); *Magic Pan, Inc., v. N.L.R.B.*, 627 F.2d 105 at 107 (7th Cir. 1980); and *Big Y Foods, Inc., v. N.L.R.B.*, ___ F.2d ___, 107 LRRM 2971, 2975 (1st Cir. 1981). Petition, p. 27, n. 11.

In fact, not one of those decisions stands for the proposition for which it is cited by the Petitioner. In *Prudential Insurance Company of America v. N.L.R.B., supra,* the court of appeals merely held that the employer had not met its burden of *production* to produce evidence to rebut the presumption utilized by the Board, and did not even discuss Federal Rule of Evidence 301. Similarly, in *Magic Pan, Inc., v. N.L.R.B., supra,* the court referred to the fact that the employer had not produced sufficient evidence to rebut the presumption utilized by the NLRB as a matter of satisfying its burden of production, without any discussion of the applicability of Federal Rule of Evidence 301.

And significantly in *Big Y Foods, Inc., v. N.L.R.B., supra,* the United States Court of Appeals for the First Circuit discussed the issue and distinguished the presumption utilized by the Board in that case from the presumption used here by the Board in the hospital care cases, citing *N.L.R.B. v. St. Francis Hospital of Lynwood,* 601 F.2d 404, 414, 101 LRRM 2943 (9th Cir. 1979). The court held in the *Big Y Foods* case, *supra,* that the presumption indulged in by the Board was "a rebuttable, not a conclusive" presumption, as contrasted with the presumption used by the Board in *St. Francis Hospital of Lynwood, supra,* and was subject to judicial review for "consistency with the Act and for rationality." Citing to *Beth Israel Hospital v. N.L.R.B.,* 437 U.S. 483, 501, and *N.L.R.B. v. Baptist Hospital, Inc., supra.* That court at no time held that Federal Rule of Evidence 301 was not applicable to NLRB hearings or proceedings. It stated that the Rule would apply to some "procedural" presumption, and referred to the presumption utilized in the hospital unit determination case in *N.L.R.B. v. St. Francis Hospital of Lynwood, supra.* 107 LRRM at 2971. The *Big Y Foods* case, *supra,* is certainly no authority that Federal Rule of Evidence 301 cannot be applied to judicial review proceedings involving unit deter-

minations of the Board in subsequent and related unfair labor practice proceedings[5], such as the instant case.

CONCLUSION

As set forth herein, the Petition for Writ of Certiorari fails to supply any sufficient grounds or important reasons warranting review by this Honorable Court of the judgments below within the meaning of Rule 17, Rules of the United States Supreme Court. The judgments below are clearly correct. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRADLEY, CAMPBELL & CARNEY
Professional Corporation

By _____
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[5]The United States Court of Appeals for the Tenth Circuit in its decision in *Presbyterian/St. Luke's*, below, Appendix B, at p. 13, n. 3, held that to the extent the decision of the Ninth Circuit in *N.L.R.B. v. Tahoe Nuggets, Inc.*, 584 F.2d 293 (1978), *cert. denied*, 442 U.S.C. 921 (1979), is contrary on the use of Federal Rule of Evidence 301, the Tenth Circuit declined to follow it. In that case, the Ninth Circuit held that the irrebuttable presumption of union's majority status in the certification year was not affected by Rule 301, Federal Rules of Evidence, 584 F.2d at 297. The court stated that that particular presumption had been approved by reviewing courts both before and after the adoption of the Federal Rules of Evidence. The Ninth Circuit did *not* rule that Federal Rules of Evidence 301 are not applicable to any other presumptions of the Board in the administration of the Act, and significantly, cited its decision in *N.L.R.B. v. Tragnieu, Inc.*, *supra*, elsewhere in the opinion with approval. See, 585 F.2d at 298.

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ST. ANTHONY HOSPITAL SYSTEMS, *Petitioner,*	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD, *Respondent,*	)	No. 80-1968
and	)	
ST. ANTHONY'S FEDERATION OF NURSES AND HEALTH PROFESSIONALS, *Intervenor*	)	

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board (No. 27-CA-6723)

Earl K. Madsen (Lawrence W. Marquess with him on the brief) of Bradley, Campbell & Carney, Golden, Colorado, for Petitioner.

Charles P. Donnelly (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel,

Elliott Moore, Deputy Associate General Counsel, and John G. Elligers, Attorney, with him in the brief), National Labor Relations Board, Washington, D.C., for Respondent.

Michael Radzilowsky (Lawrence A. Poltrock and Stepehen G. Daday with him on the brief) of Dejong, Poltrock, & Giampietro, Chicago, Illinois, for Intervenor.

Before BARRETT and LOGAN, Circuit Judges, and O'CONNOR, District Judge*.

LOGAN, Circuit Judge.

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*Honorable Earl E. O'Connor of the United States District Court for the District of Kansas, sitting by designation.

St. Anthony Hospital Systems petitions for review of a decision and order of the National Labor Relations Board (NLRB or Board) finding the hospital engaged in unfair labor practices by refusing to bargain with St. Anthony's Federation of Nurses and Health Professionals/AFT/FNHP, CFT, AFL-CIO (the union). The only issues raised on appeal are whether the Board (1) unconstitutionally asserted jurisdiction over the hospital, which is argued to be exempt under the First Amendment from governmental regulation because it is owned and operated by the Roman Catholic Church, (2) erred in ruling that a unit composed only of registered nurses is an appropriate bargaining unit under section 9(b) of the National Labor Relations Act (NLRA), 29 U.S.C. §159(b), and (3) erred in holding that individuals classified as Staff Nurse I were not supervisors within the meaning of section 2(11) of the NLRA, 29 U.S.C. §152(11).

St. Anthony Hospital Systems (St. Anthony), consisting of a main or central building and a satellite facility, is a non-profit medical institution owned and operated by the Sisters of the Order of St. Francis, a Roman Catholic Order. In 1979 the union filed a representation petition with the NLRB, seeking certification as the exclusive bargaining representative of all non-supervisory registered nurses employed by the hospital. Following a hearing at which St. Anthony unsuccessfully challenged the appropriateness of the requested bargaining unit, the Board's regional director issued a direction of election in the registered nurse unit. The Board denied St. Anthony's request for review. A majority of the eligible employees voted in favor of representation by the union, following which the director certified the union as the exclusive collective bargaining representative for the hospital's professional registered nurse employees. St. Anthony has obtained judicial review of the unit determination by refusing to bargain with the union. *See,* Magnesium Casting Co. v. NLRB, 401 U.S. 137, 139 (1971); Osteopathic Hosp. Founders Ass'n v. NLRB, 618 F.2d 633,640 (10th Cir. 1980). In its answer to the complaint issued by the General Counsel of the NLRB, St. Anthony claimed the Board's assertion of jurisdiction was unconstitutional on the ground that the hospital is a religious organization exempt from intrusive governmental regulation under the First Amendment. It also denied that the union was a proper labor organization under the NLRA, challenged the appropriateness of the unit determination, and objected to the inclusion of Staff Nurse I employees in the bargaining unit, claiming they were supervisors within the meaning of 29 U.S.C. §152(11). The Board granted the General Counsel's motion for summary judgment, ordering St. Anthony to cease and desist from its unfair labor practices and directing it to bargain collectively with the union. The case is before this Court on St. Anthony's petition for review of the Board's order and the Board's application for enforcement. The union is present as intervenor.

The record indicates that St. Anthony failed to object to jurisdiction during the representation proceeding and first asserted its First Amendment challenge to jurisdiction in the unfair labor practice proceedings before the Board. Apparently relying on section 102.67(f) of its Rules and Regulations, 29 C.F.R. §102.67(f) (1980),[1] the Board determined St. Anthony was not entitled to litigate the constitutional issue which could have been, but was not, raised in the prior representation proceeding. In *NLRB v. Peyton Fritton Stores, Inc.*, 336 F.2d 769, 770 (10th Cir. 1964), we held that while the statutory jurisdiction of the Board may be challenged at any time, "the *facts* upon which the Board determines it has jurisdiction may be challenged only upon timely exception, in the absence of which the Board's findings are not open to attack in the proceeding for enforcement." (Emphasis added.) The Board's non-relitigation rule protects the integrity of the administrative process by requiring a party to develop all arguments and present all available, relevant evidence at the representation proceeding, the first instance in which the Board exercises jurisdiction. It would indeed be a waste of time, money, and effort if an employer could remain silent on this issue throughout the representation proceeding, refuse to bargain after certification, then ultimately defeat unionization on constitutional grounds asserted for the first time in the ensuing unfair labor practice proceeding. We affirm the

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[1] 29 C.F.R. §102.67(f) provides in pertinent part:

> "(f) . . . Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. *Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.*"

(Emphais added.)

Board's determination that the First Amendment issue, having been untimely raised, was not cognizable by the Board in the underlying unfair labor practice hearing. The issue is therefore not properly before this Court on St. Anthony's petition for review. *See* Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 162 (1941). *Cf.* St. Elizabeth Community Hosp. v. NLRB, 626 F.2d 123 (9th Cir. 1980) (First Amendment challenge to jurisdiction was timely only because raised in representation proceeding and not deferred until the enforcement proceedings).

The issues concerning whether the nurses should be a separate bargaining unit and whether those classified as Nurse I were supervisors were raised before the Regional Director and the Board in the representation proceedings and may be reviewed here. *See* Pittsburg Plate Glass Co. v. NLRB, 313 U.S. 146, 154 (1941); NLRB v. Jackson Farmers, Inc., 432 F.2d 1042 (10th Cir. 1970), *cert. denied,* 401 U.S. 955 (1971). The Board has been granted broad discretion in determining appropriate bargaining units, and its decisions will be set aside only if shown to be arbitrary or capricious. NLRB v. Dewey Portland Cement Co., 336 F.2d 117, 119 (10th Cir. 1964). Hence, it is our function on review to determine whether the Board, when exercising the wide discretion committed to it, has stayed within the purview of the authorizing statutes. NLRB v. Groendyke, 372 F.2d 137, 140 (10th Cir. 1967), *cert. denied,* 397 U.S. 935 (1970). In granting the General Counsel's motion for summary judgment and affirming the Regional Director's decision, the Board clearly seems to have accepted the director's reasoning, based on *Mercy Hospitals of Sacramento, Inc.,* 217 N.L.R.B. 765 (1975), and *Allegheny General Hospital,* 239 N.L.R.B. 872 (1978), "that a unit restricted to registered nurses is a presumptively appropriate one," and that in this case "the presumption . . . has not been overcome by the Employer's evidence." R. Vol. V at 3244. *See id.* at 3311. Acknowledging *NLRB v. St. Francis Hospital of Lynwood,* 601 F.2d 404 (9th Cir. 1979), the Regional Director and the Board applied a rebuttable pre-

sumption that the nurse unit was appropriate. Nevertheless, we believe the opinions clearly do not go far enough in following the congressional directive. *See* R. Vol. V at 3244-45, 3311-12.

On the appropriate unit issue, the case at bar is identical in all significant respects to *Presbyterian/St. Luke's Medical Center v. NLRB*, No. 80-1426 (10th Cir. July 7, 1981), in which we held the Board's application of the rebuttable presumption both impermissibly shifts the burden of persuasion and violates Congress' directive to avoid proliferation of bargaining units in the health care industry. Our holding in *Presbyterian/St. Luke's Medical Center* is fully applicable to this case. We hold the Board's unit determination, based on the presumption of appropriateness and a duty in the employer to overcome it, improperly relieved the General Counsel of the burden to establish that an unfair labor practice occurred. Because our holding on this issue renders the Board's order unenforceable, we find it unnecessary to address St. Anthony's remaining contention that the Board improperly included Staff Nurse I employees in the bargaining unit.

The petition for review is granted. The cross-application for enforcement is denied. The cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PRESBYTERIAN/ST. LUKE'S MEDICAL CENTER, *Petitioner-Appellant,*	)	
v	)	
NATIONAL LABOR RELATIONS BOARD, *Respondent-Appellee*	)	No. 80-1426
and	)	
ST. LUKE'S FEDERATION OF NURSES AND HEALTH PROFESSIONALS, *Intervenor*	)	

On Petition for Review and Cross-Application
For Enforcement of an Order of The
National Labor Relations Board
(Case No. 27-CA-6574-2)

Clifton L. Elliott and Gina Kaiser of Roan & Grossman, Kansas City, Kansas, for Petitioner-Appellant.

Linda Dreeben, Attorney (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, and

John H. Ferguson, Attorney, with her on the brief), National Labor Relations Board, Washington, D.C., for Respondent-Appellee.

Michael Radzilowsky (Lawrence A. Poltrock and Stephen G. Daday with him on the brief), of DeJong, Poltrock & Giampietro, Chicago, Illinois, for Intervenor.

K. Bruce Stickler and Arthur E. Beck of Wood, Lucksinger & Epstein, Chicago, Illinois, filed an amicus curiae brief for American Hospital Association.

Before BARRETT and LOGAN, Circuit Judges, and O'CONNOR, District Judge.*

BARRETT, Circuit Judge.

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*Of the United States District Court for the District of Kansas, sitting by designation.

Presbyterian/St. Luke's Medical Center seeks review of an unreported order of the National Labor Relations Board requiring it to bargain with the St. Luke's Federation of Nurses and Health Professionals AFT, CFT, AFL-CIO. The Board cross-petitions for enforcement of the order.

Presbyterian/St. Luke's Medical Center is a three hospital system located in Denver, Colorado. The Center grew out of a July, 1979, merger between St. Luke's Hospital Association and the Presbyterian Medical Center. Prior to the merger, St. Luke's Hospital Association operated a single facility — St. Luke's Hospital. The Presbyterian Medical Center operated two institutions — one hospital located ten blocks from the St. Luke's facility, and a second acute-care institution twelve miles

away in Aurora, Colorado. *See The Presbyterian Medical Center,* 218 N.L.R.B. No. 192 (1975).

In October, 1979, the Union filed with the Board a petition for certification as the bargaining representative of the registered nurses employed at the St. Luke's facility of the Medical Center. The Medical Center contested the petition challenging the appropriateness of the bargaining unit. The unit is limited to registered nurses at the St. Luke facility only, rather than all professionals, other than physicians, at all three hospitals. The Medical Center's position was tied to Congress' directive that the Board avoid unnecessary proliferation of bargaining units in non-profit health care facilities.

Following five days of hearings, the Board's regional director found that a separate unit of registered nurses at the St. Luke's facility was appropriate for collective bargaining purposes. The Medical Center's request for Board review was denied in January, 1980. Thereafter, a majority of the employees in the unit selected the Union as their representative. On January 24, 1980, the Board certified the Union as the exclusive collective bargaining representative for all registered nurses at St. Luke's Hospital.[1]

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[1]The bargaining unit certified consists of:

INCLUDED: All full-time and regular part-time registered nurses, including in-service education nurses, cardiovascular specialists, diabetic stroke technicians, hyperclementation nurse clinician, float pool nurses, certified anesthetists, and all other registered nursing employees at the St. Luke's facility of the employer located at 601 E. 19th Avenue in Denver, Colorado.

EXCLUDED: Unit supervisors, assistant unit supervisors, department directors, assistant department directors, patient representatives and other supervisory and managerial employees, and guards as defined in the Act and all other employees of the above facility.

When the Medical Center subsequently refused to bargain with the Union, unfair labor practice charges were filed. Violations of §8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C.A. §158(a)(1), (5), were alleged. In answer to the charges, the Medical Center admitted the refusal to bargain, defending instead on the inappropriateness of the unit. The Board overruled the Medical Center objections and ordered the Medical Center to bargain with the Union on request, as well as to post notices to that effect.

The sole issue on appeal is whether the Board erred in holding that the Medical Center committed an unfair labor practice by refusing to bargain with the St. Luke's Federation of Nurses and Health Professionals AFT, CFT, AFL-CIO.[2]

The Appropriateness of the Bargaining Unit

For nearly thirty years, non-profit health care institutions were excluded from the operation of the National Labor Relations Act, *supra*. In 1974, Congress amended the Act extending coverage to large numbers of employees in the industry. *See generally*, Vernon, *Labor Relations in the Health Care Field under the 1974 Amendments to the National Labor Relations Act*, 70 NW. U. L. Rev. 202 (1975). The elimination of this exemption "reflected Congress' judgment that hospital care would be improved by extending the protection of the Act to nonprofit health care employees." *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 497 (1978).

One area of concern encompassed by the legislation dealt with disputes over bargaining units. Unable to agree on specific legislation, the House and Senate committees considering the amendment chose to address the

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[2]It is settled that "an employer may secure judicial review of a unit determination by simply refusing to bargain with a union after its certification." *Osteopathic Hospital Founders Asso. v. NLRB*, 618 F.2d 633, 640 (10th Cir. 1980).

problem in their respective reports. Each committee wrote:

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]
>
> [1]By our reference to *Extendicare*, we do not necessarily approve of all of the holdings of that decision.
>
> S.Conf. Rep. No. 988, 93d Cong., 2d Sess., *reprinted in* [1974] U.S.Code Cong. & Admin.News pp. 3946, 3950; S.Rept. No. 766, 93d Cong., 2d Sess. 5 (1974); H.Rept. No. 1051, 93d Cong. 2d Sess. 7 (1974).

Much has been written concerning the committee's statements in this area. *Mary Thompson Hospital, Inc. v. N.L.R.B.*, 621 F.2d 858 (7th Cir. 1980); *Allegheny General Hospital; v. N.L.R.B.*, 608 F.2d 965 (3d Cir. 1979); *N.L.R.B. v. Mercy Hospital Ass'n.*, 606 F.2d 22 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (1980); *N.L.R.B. v. St. Francis Hospital of Lynwood*, 601 F.2d 404 (9th Cir. 1979); *N.L.R.B. v. West Suburban Hospital*, 570 F.2d 213 (7th Cir. 1978); *St. Vincent's Hospital v. N.L.R.B.*, 567 F.2d 588 (3d Cir. 1977); *Long Island College Hospital v. N.L.R.B.*, 566 F.2d 833 (2d Cir. 1977), *cert. denied*, 435 U.S. 996 (1978); *Memorial Hospital of Roxborough v. N.L.R.B.*, 545 F.2d 351 (3d Cir. 1976). With most of it we agree. In one statement, we heartily concur:

> Congress directed the Board to apply a standard in this field that was not traditional. Prolifera-

> tion of units in industrial settings has not been the subject of congressional attention but fragmentation in the health care field has aroused legislative apprehension.

St. Vincent's Hospital v. N.L.R.B., supra, at p. 592.

A.
Unit Scope

The appropriateness of a bargaining unit depends on both its scope and composition. We here deal with the first consideration — whether the bargaining unit should comprise employees solely at St. Luke's Hospital or at all employer facilities.

The Board has declined to accede to Congress' directive in determining issues of unit scope. In *Memorial Medical,* 230 N.L.R.B. No. 140 n. 5 (1977), the Board held that the legislative history of the 1974 amendments demonstrates that concern with bargaining unit proliferation was solely with the composition of units within particular facilities, not with the question of whether the unit's scope should include one facility or several facilities.

Rather than apply Congress' directive, the Board has presumed single facility units appropriate "where there is no bargaining history in a more comprehensive unit and the degree of functional integration with other facilities is insufficient to negate the separate identity of the facility in which a union seeks representative status." *Samaritan Health Services, Inc.,* 238 N.L.R.B. No. 56 (1978). The presumption is, of course, rebuttable. *Id.* Among the factors considered are the geographic proximity of the facilities, history of collective bargaining unionization, extent of employee interchange, functional integration of operations, and centralization of management, particularly in regard to control of personnel and labor relations. *See e.g., N.L.R.B. v. Groendyke Transport, Inc.,* 417 F.2d 33 (10th Cir. 1969),

cert. denied, 397 U.S. 935 (1970); *Magic Pan, Inc. v. N.L.R.B.*, 627 F.2d 105 (7th Cir. 1980); *N.L.R.B. v. Chicago Health and Tennis Clubs, Inc.*, 567 F.2d 331 (7th Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

Consistent with the Board's views, the regional director applied the presumption here holding that "while a systemwide unit may be appropriate, the evidence does not rebut the presumption." R., Vol. I, p. 4. The Medical Center argues that the application of this presumption is inconsistent with the congressional admonition against undue proliferation of bargaining units in the health care field.

The issue is to what unit is appropriate for bargaining rests in the sound discretion of the Board. *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485 (1947); *Newspaper Printing Corp. v. N.L.R.B.*, 625 F.2d 965 (10th Cir. 1980). Nevertheless, we must insure that the Board's exercise of discretion is not unreasonable, arbitrary, unsupported by the evidence, or in conflict with congressional intent. *S.E.C. v. Sloan*, 436 U.S. 103 (1978); *N.L.R.B. v. Brown*, 380 U.S. 278 (1965).

Our reading of the legislative history underlying the 1974 amendments confirms the Board's views that the references "cautioning against undue proliferation in the health care field refer to matters involving unit composition, that is, the types of employees to be represented in a bargaining unit . . . with which any single institution must collectively bargain." *Memorial Medical, supra*, at n. 5. We do not agree, however, that this concern necessarily demonstrates congressional insensitivity to proliferation problems caused by mechanical application of the presumption to issues of unit scope. Nor do we believe Congress' silence in this area blindly constituted ratification of the single facility presumption in health care facilities. In our view, it appears more likely that Congress did not anticipate the issue.

The Board is given broad authority to determine the unit appropriate for collective bargaining under section 9(b) of the Act, 29 U.S.C.A. §159(b). Neither the Act nor the legislative history offer conclusive answers to the issue at bar. "But the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in light of the evident legislative purpose in enacting the law in question." *United States v. Bornstein*, 423 U.S. 303, 310 (1976).

It has long been a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Steelworkers v. Weber*, 443 U.S. 193, 201 (1979), *quoting Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). In the construction of labor legislation the principle has "particular application". *Woodwork Manufacturers v. N.L.R.B.*, 386 U.S. 612, 619 (1967). This is so because legislation such as that involved here is "to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor". *Local 1976, United Brotherhood of Carpenters v. N.L.R.B.*, 357 U.S. 93, 99-100 (1958); *Woodwork Manufacturers v. N.L.R.B., supra.*

The legislative history here reveals a strong current of congressional concern for the problems engendered by unwarranted unit fragmentation whether it be in composition or scope. As we view it, the Board's refusal to consider Congress' directive with regard to scope issues has subjected the health care industry to the very dangers Congress sought to prevent.

We hold that the traditional factors used in scope determinations "must be put in balance against the public interest in preventing fragmentation in the health care field." *St. Vincent's Hospital v. N.L.R.B., supra*, at p. 592. Moreover, the Board must specify "the manner in which its unit determination[s] . . . implement [ ] or

reflect[ ] that admonition." *N.L.R.B. v. West Suburban Hospital, supra,* at p. 216.

We recognize that labor legislation should normally be construed in a liberal manner to effectuate its remedial purposes. However, in our anxiety to aid the congressional purpose of promoting industrial stabilization through collective bargaining, we must guard against extending the scope of the statute beyond Congress' intent. *62 Cases of Jam v. United States,* 340 U.S. 593, 600 (1951). The Board has failed to recognize Congress' directive in unit scope determinations.

Unit Composition

We now turn to the question of whether the Board erred in its determination of the unit's composition.

In the representation proceeding, the regional director ruled that (a) a unit restricted to registered nurses is presumptively appropriate, and (b) based on the Board's singularity of interests analysis, the presumption in favor of the registered nurses unit was not *overcome* by the Medical Center. Inasmuch as the Board erred in accepting the presumption of appropriateness, we must deny enforcement of its order.

(a)

The use of rebuttable presumptions is tied to various rationale — judicial economy, regularity and fairness; probability; and public policy. Louisell and Mueller, *Federal Evidence* §68, pp. 541-542. Yet, the procedural effects may differ. Most affect only the burden of producing evidence. *See e.g.,* Fed. Rules Evid. rule 301, 28 U.S.C.A. Others affect both the burdens of producing evidence *and* of persuasion. *See e.g. Keyes v. School District No. 1, Denver, Colo.,* 413 U.S. 189 (1973). In those presumptions falling within the first category, "the presumption *disappears* upon introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact. [Emphasis supplied]. Louisell and

Mueller, *supra* at §69, pp. 554-555. *See,* Fed. Rules Evid. rule 301, 28 U.S.C.A.; Comm. of Conf. Rep. No. 93-1597, 93d Cong. 2d Sess., *reprinted* [1974] U.S. Code Cong. & Admin. News p. 7098, 7099. Rebuttable presumptions falling within the second category "retain their vitality until the trier of fact is persuaded as to the nonexistence of the presumed fact." Louisell and Mueller, *supra* at §69, p. 555.

Our review of the record convinces us that the rebuttable presumption applied in this case shifted *both* the burdens of producing evidence *and* persuasion. The regional director specifically held that the presumption was not overcome by the Medical Center's evidence.

In our view, there was sufficient evidence adduced to sustain the appropriateness of an all professional unit, excluding physicians. We, of course, focus on the "disparity of interests between employee groups which would prohibit or impede fair representation of employee interests." *N.L.R.B. v. St. Francis Hospital of Lynwood, supra,* at p. 419. A multi-disciplinary team approach to patient care is employed by the Hospital. Interaction between registered nurses and other professionals is encouraged. Decentralization of the pharmacy has occurred with the physical relocation of individual pharmacists to nursing stations at patient care units. Social workers at the facility spend one-half their time in the patient care units. This, of course, results in substantial interaction between these professionals and the staff nurses.

Several nurses at the facility observed that they have little contact with nurses from units other than their own. One post-operative nurse observed that she had more contact with physical therapists than nurses outside her specialty. Other specialty nurses supported this view. Christine Tanner, a noted nurse educator, testified that nurses who specialize often have more in common with persons in disciplines related to their

specialties than other registered nurses practicing in other specialty areas.

Certain of the registered nurses work 3:00 p.m.-11:30 p.m. or 11:00 p.m.-7:30 a.m. This factor alone, however, is not dispositive. *Id.* at p. 419. Similarly, the licensing-education requirements, and departmental segregation are not wholly controlling. *Id.* at p. 419. "The fact that a state may choose to regulate a particular occupation should not be controlling in the determination of an appropriate bargaining unit." *Id.* at p. 420.

In sum, the evidence presented was sufficient to sustain a finding of the inappropriateness of the proposed unit had it been accepted. If the presumption had simply shifted the burden of producing evidence to the employer, the offer of this contradictory evidence would have neutralized the presumption.

In unfair labor practice hearings, such as that presented here, the Board, to the extent practicable, must apply the rules of evidence governing proceedings in the district courts of the United States. N.L.R.A. §10(b); 29 U.S.C.A. §160(b); *N.L.R.B. v. Process & Pollution Control Co.*, 588 F.2d 786 (10th Cir. 1978). When the Federal Rules of Evidence were adopted, Congress provided that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party against whom it was originally cast." Fed. Rules Evid. rule 301, 28 U.S.C.A.

Application of the presumption employed here violated the mandate of Federal Rule of Evidence 301.[3]

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[3]To the extent that *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979) is contrary, we decline to follow it.

Such a presumption cannot be used to alter General Counsel's burden to establish by a preponderance of evidence that an unfair labor practice has occurred. *See N.L.R.B. v. Dillion Stores,* 643 F.2d 687 (10th Cir. 1981); *N.L.R.B. v. First Nat. Bank of Pueblo,* 623 F.2d 686 (10th Cir. 1980); *N.L.R.B. v. Silver Spur Casino,* 623 F.2d 571 (9th Cir. 1980), *cert. denied,* ___ U.S. ___ (1981). The Board's order was impermissibly tainted by the presumption's application.[4]

(b)

We do not rest our decision on this ground alone. In our view, any use of a presumption which casts upon the Medical Center the burden of producing evidence of the inappropriateness of the unit violates Congress' directive of avoiding non-proliferation in the health care industry. The legislative history underlying the 1974 amendments expresses concern that egregious unit proliferation such as found in the construction trades, could impede effective health care delivery. We agree with our sister circuits that "the Board *must* expressly consider the congressional admonition in making unit determinations," *Mary Thompson Hospital, Inc. v. N.L.R.B., supra,*

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[4]The decision and order of the Board was entered on stipulation of the parties. This does not, however, change our views. That stipulation, specifically approved by the Board, provides in part:

> It is agreed that this case shall be in the same posture before the United States Court of Appeals for the Tenth Circuit as it would have been if the standard procedures had been followed, i.e., after a Complaint had issued, the Employer would have filed an answer defending the allegations on the grounds that the bargaining unit is inappropriate, the Union would have moved for summary judgment, the Employer would have responded to the motion again asserting the bargaining unit defense, the National Labor Relations Board would have granted the motion for summary judgment, and the Employer would have then appealed to the United States Court of Appeals for the Tenth Circuit.

at p. 864, and focus on the "disparity of interests between employee groups which would prohibit or inhibit fair representation of employee interests." *N.L.R.B. v. St. Francis Hospital of Lynwood, supra,* at p. 419.

We hold that requiring health care industry employers to bear the burden of producing evidence that limited bargaining units are more inappropriate than broader bargaining units runs contrary to Congress' admonition. Rather, the Board must specify "the manner in which its unit determination in this case implement[s] or reflect[s] that admonition." *N.L.R.B. v. West Suburban Hospital, supra,* at p. 216.

"The power of an administrative . . . board to administer a federal statute and to prescribe rules and regulations to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. [An administrative decision] which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *United States v. Larionoff,* 431 U.S. 864, 873 n. 12 (1977), *quoting Manhattan General Equip. Co. v. Commissioner,* 297 U.S. 129, 134 (1936).[5]

Conclusion

We must give "due observance [to] the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution." *F.C.C. v. Pottsville Broadcasting Co.,* 309 U.S. 134, 141 (1940). Recognizing this, our function "ends when an error of law is laid bare." *F.P.C. v. Idaho Power Co.,* 344 U.S. 17, 20 (1952). At that point, our only recourse is to remand to the Board for reconsideration in light of our holding.

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[5]For these same reasons, the Board erred in applying its single facility presumption to the issue of unit scope. *See infra.*

"Application of that general principle in this case best respects the congressional scheme investing the Board and not the courts with broad powers to fashion remedies that will effectuate national labor policy." *N.L.R.B. v. Food Store Employees*, 417 U.S. 1, 10 (1974). *See also, South Prairie Construction Co. v. Local 627, Intern. Union of Operating Engineers*, 425 U.S. 800 (1976) (per curiam). "For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Securities Comm'n. v. Chenery Corp.*, 318 U.S. 80, 88 (1943).[6]

The petition for review is granted. The cross-application for enforcement is denied. The cause is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

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[6]In our case remand is especially justified. Following the decision in this case, the Board reconsidered its prior opinions in the health care industry as regards registered nurse units. *See Newton-Wellesley Hospital*, 250 NLRB No. 86 (1980). *See also: National Medical Convalescent of San Diego*, 254 NLRB No. 163 (1981); *Doctor's Hospital of Montclair*, 254 NLRB No. 175 (1981); *Federick Memorial Hospital, Inc.*, 254 NLRB No. 2 (1981); *Addison Gilbert Hospital*, 253 NLRB No. 141 (1981); *Mount Airy Foundation*, 253 NLRB No. 139 (1981); and *Brookwood Hospital Management Corp.*, 252 NLRB No. 107 (1980). An appellate court reviewing an agency decision following an intervening change of policy should remand to permit the agency to decide in the first instance whether it should reframe its order to better effectuate the policies underlying the Act it is charged with administering. *NLRB v. Food Store Employees, supra*, at p. 10. In this connection we note our disagreement with the Board's view that the "community of interests" test and the "disparity of interests" test are essentially identical. It is not the similarity of employees' training, hours, conditions and activities which determine the appropriateness of the unit. It is, rather, the dissimilarity of interests relevant to the collective bargaining process that determines which employees are not to be included in a proposed unit. The proper approach is to begin with a broad proposed unit and then exclude employees with disparate interests. One should not start with a narrow unit, such as registered nurses, and then add professionals with similar interests.